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84-319
No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

-v-

STATE BAR OF MICHIGAN,

Appellee.

On Appeal From
the Supreme Court of Michigan

APPENDIX

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In propria persona
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May, 1984

160 pp

EDITOR'S NOTE

PAGES 1 thru 1a WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FINAL OPINION
State of Michigan
In the Supreme Court
ALLAN FALK -v- STATE BAR OF MICHIGAN

PER CURIAM. Disposition of this matter requires us to determine whether petitioner Falk is entitled to the relief he prayed for in his "Petition for Special Relief" originally filed November 30, 1977.

A majority of the Court is not persuaded that he is so entitled and, accordingly, the relief requested in the Petition for Special Relief is denied.

This proceeding has convinced us all, however, that certain practices of the State Bar may warrant closer scrutiny pursuant to our duty to superintend its activities. We will in the near future, therefore, by separate administrative order, appoint a committee to review those practices and activities and make recommendations to the Court.

Petition dismissed.

WILLIAMS, C.J., and KAVANAGH, LEVIN, RYAN, BRICKLEY, CAVANAGH, and BOYLE, JJ., concurred.

BOYLE, J. Plaintiff Falk began this suit on November 30, 1977, by filing a "Petition for Special Relief" naming the State Bar of Michigan as defendant. Plaintiff raised First Amendment constitutional challenges to various activities of the State Bar based on the funding of those activities from his mandatory dues.[1] This Court appointed former Judge Maurice E. Schoenberger to conduct a hearing and make findings of fact. After receipt of Judge Schoenberger's report and the transcript of the hearing he conducted, and after briefing and oral argument, this Court rendered its first opinion

[1] Plaintiff has not contested the validity of expenditures in support of the Attorney Grievance Commission, the Character and Fitness Committee, and the Institute for Continuing Legal Education.

in this case. *Falk v State Bar of Michigan*, 411 Mich 63; 305 NW2d 201 (1981) *(Falk I)*.

The members of this Court were unable to agree in *Falk I* concerning the extent of the relief, if any, that plaintiff should receive. The Court unanimously agreed, however, that further factual findings should be ordered. Therefore, the Court appointed the Honorable James H. Lincoln to conduct additional hearings. The Court ordered further development of the record with regard to the following activities of the State Bar:

> "[T]he Young Lawyers Section and Lawyers Wives, the Lawyer Placement Service, the commercial sale of the bar's mailing list, and bar activities addressed to influencing legislation." 411 Mich 83.[2]

We now have the results of those extensive hearings. Both sides have again briefed and argued the relevant issues.

At the outset, I agree with the opinion of Justice RYAN in *Falk I*, pp 84-87,[3] concerning our jurisdiction to hear and dispose of this case. That is, I agree that plaintiff's petition most closely resembles and is properly treated as a complaint for a writ of superintending control under GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219. I note also that Justice WILLIAMS in his opinion in *Falk I, supra*, p 122, fn 4, reached this issue and concurred with Justice RYAN's treatment

[2] In connection with the Lawyers Wives activities, the Court advised that no further evidence was necessary concerning the preparation and distribution of the Juror's Manual, the distribution of the "You and the Law" booklet, and funding of the Children's Charter. 411 Mich 83, fn 1.

[3] I do not, however, adopt the disposition of plaintiff's invasion of privacy claim made by Justice RYAN in *Falk I*, 411 Mich 85, fn 3. Nor do I adopt his disposition of plaintiff's First Amendment challenge to bar expenditures for certain social functions, *id.* See discussion below.

of the petition as a complaint for a writ of superintending control. Because five members of this Court have previously reached and disposed of this issue, it is properly viewed as the law of the case. Therefore, I agree that this case is properly within this Court's original jurisdiction.

I. THE EFFECT OF *FALK I*

As pointed out in the several opinions in *Falk I*, it is undisputed that the State Bar of Michigan is an "integrated bar". "[T]he State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, compels all licensed attorneys to associate in and provide financial support for the integrated State Bar." *Falk I, supra*, p 87 (opinion of RYAN, J.).

Plaintiff challenges the use of his mandatory dues to finance various activities of the bar. Justice WILLIAMS listed those activities in *Falk I:*

> "(1) lobbying and other political activity, (2) compulsory membership in Young Lawyers Section, (3) promoting prepaid legal services, (4) lawyer referral, (5) lawyer placement, (6) Client Security Fund, (7) public education about legal services, (8) funding of Lawyers Wives of Michigan and Children's Charter of Michigan activities, (9) giving and paying for social functions, including those where the Supreme Court Justices are guests of honor, (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court and other judicial salaries, and (11) sale of use of State Bar mailing roster." 411 Mich 120.

Upon analysis of the several opinions in *Falk I*, it appears that some of these challenged activities have passed constitutional muster. The Court unanimously rejected plaintiff's challenge to the use of his dues for support of the bar's lawyer

referral service.[4] The Court was also unanimous in rejecting the challenge to expenditures for public education about legal services.[5] A majority of the Court also upheld the use of bar dues to finance a Client Security Fund.[6] By application of the law-of-the-case doctrine, we are foreclosed from reconsideration of those items here.

In addition, two other challenges are now moot. At the present time, the bar provides an opportunity to its members to remove their names from the mailing list which is offered for sale to interested parties. Similarly, otherwise eligible members of the Young Lawyers Section may disassociate themselves from membership in that organization.[7] Therefore, neither of these issues presents a constitutional question requiring resolution at this time.

To summarize, plaintiff's challenges to the following activities remain undecided after *Falk I*: (1) certain activities of the Young Lawyers Section, (2) promotion of prepaid legal services, (3) lawyer placement services, (4) certain activities of the Lawyers Wives, (5) social functions, (6) appearing before the State Officers Compensation Commission, and (7) lobbying and other political activity.

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[4] *Falk I, supra*, pp 115-116 (opinion of RYAN, J.); pp 153-156 (opinion of WILLIAMS, J.); pp 175-176 (opinion of LEVIN, J.).

[5] *Falk I, supra*, p 115 (opinion of RYAN, J.); pp 157-158 (opinion of WILLIAMS, J.); pp 175-176 (opinion of LEVIN, J.). I also find that the combined opinions of Justices WILLIAMS and LEVIN have validated bar expenditures which relate to the public education activities of the Young Lawyers Section and the Lawyers Wives, specifically the publication and distribution of the Juror's Manual, the "You and the Law" booklet, and the funding of the Children's Charter. *Falk I, supra*, pp 151-153, 157-158 (WILLIAMS, J.); p 176 (LEVIN, J.).

[6] *Falk I, supra*, p 115 (opinion of RYAN, J.); pp 153-156 (opinion of WILLIAMS, J.). The opinion of Justice LEVIN, which was joined by Justice KAVANAGH, was silent on this issue.

[7] Some funded activities of the Young Lawyers do continue to present a live controversy. See discussion below.

II. THE CONSTITUTIONAL TEST

As indicated above, there was no agreement among a majority of the members of this Court in *Falk I* concerning the proper constitutional standard to be applied to test plaintiff's challenges to expenditures of the integrated State Bar of Michigan. Three members of the Court believed that relevant First Amendment[8] decisions of the United States Supreme Court required that bar activities be subjected to strict scrutiny:

"We therefore conclude that, in light of the controlling First Amendment principles as hereinabove discussed, the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys." 411 Mich 112 (opinion of RYAN, J.).

Two other members of the Court believed a different constitutional test was applicable:

"We find that the First Amendment is not absolute but will give way to certain state activities which are germane to a compelling state interest. The state has a compelling interest in promoting improvements in the administration of justice and advancing the science of jurisprudence in order to fulfill its function of protecting the health, safety and welfare of its citizens. The

[8] We recognize that it is technically a violation of the Fourteenth Amendment that plaintiff asserts has occurred through the action of the State of Michigan. It is through the Due Process Clause of the Fourteenth Amendment that First Amendment freedoms are protected from infringement by the states. See *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc*, 425 US 748, 749, fn 1; 96 S Ct 1817; 48 L Ed 2d 346 (1976). We will refer to the First Amendment for the sake of convenience.

state may employ activities which are germane to this compelling state interest." 411 Mich 132 (opinion of WILLIAMS, J.).

The remaining two members found it unnecessary to decide what the appropriate standard of judicial scrutiny was because of the inadequately developed record.[9] See *Falk I, supra*, p 175 (opinion of LEVIN, J.).

I am unable to agree that either of the formulations of the constitutional test in *Falk I* is correct. I am brought to this conclusion by a careful analysis of the precise First Amendment interest to be protected under these circumstances and by an examination of the cases in which the United States Supreme Court has discussed such an interest.

A. The Interest

The most familiar First Amendment claim is a challenge to state action in which a citizen complains of some interference by the government with an attempt to exercise, in an affirmative way, protected rights to speak or to associate with others. Typical First Amendment cases involve persons who wish to express themselves in a particular manner in the face of limiting or prohibitory government regulation.[10] Other typical cases involve individuals who wish to associate with others and who claim that governmental action in some manner inhibits their ability to do so.[11]

This case does not fit the typical mold. Rather,

[9] However, Justice LEVIN did find that certain activities of the bar were clearly permissible even under the strictest standard of review. *Falk I, supra*, pp 175-176. See discussion in Part I.

[10] See, *e.g.*, *Shuttlesworth v City of Birmingham*, 394 US 147; 89 S Ct 935; 22 L Ed 2d 162 (1969).

[11] See, *e.g.*, *Keyishian v Board of Regents of University of State of New York*, 385 US 589; 87 S Ct 675; 17 L Ed 2d 629 (1967).

what plaintiff complains of here is, in essence, government action which compels him to associate and compels him to participate in certain forms of expression.[12] The right that plaintiff asserts is a right of non-association and of non-expression.

Because the individual seeks, in effect, to remain silent, the right of non-association cannot logically be based on the policy of maintaining a "free market place for ideas" which is usually advanced in connection with rights of unfettered expression. However, compelled association can reasonably be seen as an infringement upon more personal individual interests such as freedom of conscience. See Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 BC L Rev 995, 1004 (1982). Professor Laurence Tribe has described this interest more completely:

"The Constitution has enumerated specific categories of thought and conscience for special treatment: religion and speech. Courts have at times properly generalized from these protections, together with the guarantees of liberty in the due process clauses of the fifth and fourteenth amendments, to derive a capacious realm of individual conscience, and to define a 'sphere of intellect and spirit' constitutionally secure from the machinations and manipulations of government." Tribe, *American Constitutional Law*, § 15-5, pp 899-900.

Recognition of the nature of plaintiff's interest is the analytical *sine qua non* for resolution of the issues currently before the Court and also the appropriate vehicle for understanding and harmonizing the relevant United States Supreme Court

[12] Such rights have been referred to as "negative" First Amendment rights. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 BC L Rev 995, 996 (1982).

decisions. Once harmonized, these cases produce a test which can be applied to the facts of the case at bar.

B. The Cases

The Supreme Court of the United States has recognized a constitutional right of non-association in several cases.[13] The first of these was *West Virginia State Bd of Ed v Barnette*, 319 US 624; 63 S Ct 1178; 87 L Ed 1628 (1943). In that case, the school board required all students and teachers to salute the flag and recite the pledge of allegiance in the classroom. Failure to do so constituted grounds for expulsion or dismissal. Plaintiffs, who were Jehovah's Witnesses, refused to salute the flag because of their religious beliefs. The Court invalidated the statute on First Amendment grounds.[14]

The next case decided by the Court which involved negative First Amendment rights was *Wooley v Maynard*, 430 US 705; 97 S Ct 1428; 51 L Ed 2d 752 (1977). Mr. and Mrs. Maynard, Jehovah's Witnesses, objected to the display of the New Hampshire state motto, "Live Free or Die", on the license plate of their automobile. When they cov-

[13] One case which is not discussed here is *Elrod v Burns*, 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976). In that case, the Court struck down a job requirement which forced employees of the county sheriff to belong to the political party of the sheriff in office. The Court applied strict scrutiny to invalidate the requirement as an impermissible infringement on First Amendment rights except as applied to policy-making employees. However, the application of strict scrutiny in *Elrod* can be traced to typical affirmative (as opposed to negative) speech and association concerns. The sheriff's employees could not choose to belong to the opposing political party and keep their jobs. As further analysis will show, such a restriction on protected affirmative exercises is not present on the facts of the case at bar.

[14] A plurality of the Court came to that decision without relying on an infringement of the Free Exercise Clause of the First Amendment. 319 US 635, 642 (opinion of Jackson, J.).

ered the motto with tape, they were cited for a misdemeanor. Eventually, the Maynards sued in federal court to enjoin enforcement of the misdemeanor statute on First Amendment grounds.

The Court held that the Maynards had a protected right to remain silent and to refuse to be associated with the message behind the motto:

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrian from speaking at all. See *West Virginia State Bd of Ed v Barnette*, 319 US 624, 633-634; 63 S Ct 1178; 87 L Ed 1628 (1943); *id.*, p 645 (Murphy, J., *concurring*). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, p 637." 430 US 714.[18]

The next case dealing with negative First Amendment interests was *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977). Plaintiff Falk relies heavily on this case to support his challenge. The opinions of Justices RYAN and WILLIAMS in *Falk I* agreed that *Abood* controlled the issues raised here, but disagreed concerning the standard of review called for by that case.

Abood involved a challenge by public school teachers to a statutorily mandated union shop provision of their collective-bargaining agreement. Non-union teachers were required to pay service fees equal to union dues as a condition of their employment. The teachers maintained that the

[18] As in the *Barnette* plurality, the Court did not rely on the free exercise of religion to support its holding.

exaction of such fees to support the costs of collective bargaining and to support the political activities of the union violated their First Amendment rights.

The Court found that compelling payment of the fees for either purpose implicated First Amendment interests.[18] It upheld the exaction as it related to collective bargaining, but struck down the use of the fees for political and ideological activities unrelated to collective bargaining or contract administration.

The most recently decided case involving negative First Amendment interests is *PruneYard Shopping Center v Robins,* 447 US 74; 100 S Ct 2035; 64 L Ed 2d 741 (1980). That case involved the right of citizens to peacefully distribute political material in a privately owned shopping center. The California Supreme Court held that such a right existed under the California Constitution.

The shopping center owners appealed to the United States Supreme Court, arguing *inter alia* that their First Amendment right of non-association was violated by the California decision, which in effect compelled the use of their property for political expression.

The Court rejected the owners' claim. It distinguished *Wooley* on several grounds. The Court found that because of the character of the property involved, *i.e.,* a public shopping center, reasonable persons would not be likely to connect the political views expressed there with the owners. The Court also noted that the content of the speech permitted was not prescribed by the government and that the owners were free to disavow the views expressed.

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[18] The Court did not reach the teachers' challenge to the use of the fees to support union social activities because of an inadequate record. 431 US 236, fn 33.

Finally, most directly on point for purposes of this case is the United States Supreme Court opinion in *Lathrop v Donohue*, 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961). In that case, plaintiff challenged the state's power to require him to belong and pay dues to the Wisconsin State Bar. The plaintiff objected to both the fact of mandatory membership and the use of his mandatory dues for political purposes.

A majority of the Court agreed that Wisconsin had a sufficiently significant interest in maintaining an integrated bar to justify compelling plaintiff's membership. There was no majority view, however, on the political expenditure question. Four members of the Court found that the issue had not been properly raised in the courts below. 367 US 846 (Brennan, J., plurality opinion). However, Justice Harlan, joined by Justice Frankfurter, found the question properly presented and found no First Amendment violation. 367 US 848 (Harlan, J., *concurring*).[17]

C. The Test

While the decisions of the Supreme Court make it clear that under certain circumstances there is a constitutional right to be free from compelled association or expression, the Supreme Court has not clearly articulated a test to be applied to determine the extent of that right.

However, it is clear that the Supreme Court *does not* consider the strict scrutiny applied in other First Amendment cases to be appropriate in cases involving negative First Amendment rights. Even the facts of *Barnette* did not prompt the

[17] Justice Whittaker concurred in the judgment because he believed that no constitutionally protected interest was implicated. 367 US 865. Justices Black and Douglas dissented. 367 US 865, 877.

Court to engage in the traditional test which involves a compelling state interest and the least restrictive regulatory alternative. Because such analysis is conspicuous by its absence from negative First Amendment cases, we are unable to conclude that the Supreme Court would apply it to resolve the case at bar.

However, when examined carefully, the cases discussed above reveal a consistent pattern of analysis. This close examination indicates that in resolving the various claims the Court has balanced the severity of the injury to the individual interest against the magnitude of the government interest sought to be served by the requirement or regulation. In this manner, the Court has decided whether the complained-of government action constitutes an impermissible First Amendment infringement.[15]

"Whenever a government requirement is challenged on the basis that it compels expression the initial inquiry must be whether the requirement does in fact infringe upon negative First Amendment interests and if so how seriously. The judicial task does not end here, however. It is also necessary to consider what government interests may be served by the requirement in question, and under what circumstances advancement of a government interest might outweigh the concomitant infringement of individual negative First Amendment interests." Gaebler, *supra*, p 1014.

The first step in this analysis is a determination whether the asserted claim implicates the First Amendment at all. It is only when the conduct regulated can fairly be characterized as expression that the First Amendment can be cited as a source of protection. Once a determination is made that

[15] See the invaluable analysis contained in Gaebler, *supra*, pp 1006-1014.

the government requirement infringes on a First Amendment interest, the key factor in determining the severity of the infringement is the intimacy of the connection between the individual and the compelled expression. If there is only a very attenuated link between the individual and the compelled expression, the government interest advanced to justify the requirement need not be substantial. This seems to be the import of Justice Harlan's concurring opinion in *Lathrop, supra,* p 858.

Conversely, the more directly the compelled expression relates to the individual, the more important must be the government interest advanced to justify it. For example, in *Barnette,* the government required the individual to salute the flag and verbally pledge national allegiance. A requirement which entails such intimate personal action has a direct impact on the individual's freedom of conscience and constitutes a severe invasion of the protected sphere of intellect and spirit. The individual is required to personally and directly proclaim a belief which is repugnant to him.

The Court in *Barnette* made it clear that some interest much more urgent and immediate than a general interest in national unity would have to be advanced to justify such a First Amendment infringement. 319 US 633. In fact, the Court expressed doubt about whether such an interest might ever exist. 319 US 642.

In *Wooley,* the government intrusion was less personal and direct than in *Barnette.* Being forced to display a personally offensive motto on the license plate of a vehicle requires less intimate expression than does a compulsory pledge of allegiance. Accordingly, the Court in *Wooley* devoted significantly more discussion to the asserted gov-

ernment interests behind the compelled expression. Nevertheless, it found the state interests to be insufficient in relation to the infringement.

In *Abood*, the Court held that First Amendment interests were implicated in compelling non-union teachers to pay service fees equal to union dues. However, the Court found that the government interest in preserving labor peace and the elimination of "free riders"[19] outweighed the infringement. In reaching this conclusion, the Court did not carefully examine the government interest. Arguably, this can be explained as an implicit finding that the infringement of individual interests was not severe. See Gaebler, *supra*, p 1015. Certainly, the same degree of compelled personal expression involved in *Barnette* and *Wooley* was not present in *Abood*. Non-union teachers were asked to support the right of the union to exist only through the relatively indirect method of financial support. The direct relation of the compelled support to the government interest in peaceful collective bargaining justified the infringement.

However, use of government-mandated fees for political or ideological purposes unrelated to collective bargaining was held to be an invalid infringement of a protected interest. The plurality did not specifically explain why this result was necessary. Nevertheless, because the plurality emphasized the absence of a link to collective bargaining, the result seems to turn on the insufficiency of the government interest in this aspect of the compelled contribution.

Justice Harlan engaged in similar analysis in his concurring opinion in *Lathrop, supra*, p 848,

[19] The term "free riders" refers to those who reap the benefits of collective bargaining without bearing a proportionate share of the cost. *Abood, supra*, pp 221-222.

although he arrived at a different result. He found that Wisconsin had a "most substantial state interest" in hearing "the views of the members of its Bar 'on measures directly affecting the administration of justice and the practice of law' ". 367 US 864. He acknowledged that the compelled-expression rationale in *Barnette* was relevant, but distinguished that case as involving a more concrete and intimate expression of belief:

> "What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance." 367 US 858.

Balancing is also implicit in the *PruneYard* case. As discussed above, the Court indicated that the negative First Amendment rights of the shopping center owners were not seriously infringed by the indirect form of compelled expression in that case. Because such a minor injury was involved, the Court paid little attention to the magnitude of the government interest.[30]

In summary, when these cases are considered together, a balancing test for asserted violations of negative First Amendment rights emerges.

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[30] Arguably, the Court believed that there was no First Amendment injury at all:

> "Eventually a point is reached where the level of personal involvement is so minimal and the resulting nexus between the individual and the message so remote that no legally cognizable infringement of negative first amendment interests occurs." Gaebler, *supra*, p 1014.

"In other words, negative First Amendment cases require a sliding scale approach to balancing. The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa. The question in each case must be whether the compelled participation in expression infringes unduly upon individual interests." Gaebler, *supra*, p 1016.

It is this test which should be applied to decide the merits of Falk's objections to the expenditures of his compelled bar dues.

III. THE CONSTITUTIONAL TEST APPLIED

As mentioned in Part I, this Court has not decided the merits of plaintiff's constitutional objections to the following activities of the State Bar: (1) certain activities of the Young Lawyers Section, (2) promotion of prepaid legal services, (3) lawyer placement services, (4) certain activities of the Lawyers Wives, (5) social functions, (6) appearing before the State Officers Compensation Commission, and (7) lobbying and other political activity.

In applying the constitutional test which has been articulated above, it is necessary to further examine the precise nature of plaintiff's objections to these activities.

In connection with the volunteer legal assistance rendered by the Young Lawyers Section, plaintiff argues that such activity is more properly conducted by government and funded by tax revenues. Plaintiff makes a similar argument concerning the lawyer placement services of the bar.

Plaintiff objects to the bar's promotion of prepaid legal services because, as an employee of the public sector, he receives no benefit from such promotion. Similarly, plaintiff objects to the bar's

support of the Lawyers Wives because he is unmarried and receives no benefit from the activity.

In addition, plaintiff objects to the social functions conducted by the bar and its sections and groups because the food and drink served at these gatherings violates his religious beliefs and those of other members of the bar.

Finally, plaintiff objects to the "political" activities of the bar. More specifically, he objects to the participation of the bar in legislative drafting and in more typical lobbying efforts. Additionally, plaintiff challenges the appearance of representatives of the bar at meetings of the State Officers Compensation Commission. Bar representatives appear before the commission to argue on behalf of increased judicial compensation.

We will apply the constitutional test separately to the political and non-political challenges raised by plaintiff.

A. Non-Political Activities

As discussed above, our first task in deciding the negative First Amendment claims raised by plaintiff is to determine if the government requirement infringes upon any negative First Amendment interests. If no infringement has occurred, the inquiry goes no further.

In connection with plaintiff's challenges to non-political activities of the bar, we find that plaintiff has not met his burden of proof in showing an injury to a protected First Amendment interest.[21] Plaintiff has not pointed out to this Court any

[21] We construe plaintiff's complaint and briefs in a light most favorable to him when we view his challenges as based upon asserted First Amendment violations. Plaintiff's arguments based on art 4, § 24 of the Michigan Constitution of 1963 (title-object clause), the Commerce Clause, US Const, art I, § 8, and other constitutional provisions are devoid of merit. See discussion in *Falk I, supra*, pp 141-142 (opinion of WILLIAMS, J.).

aspect of those activities which can fairly be characterized as compelled expression. Indeed, we doubt whether these activities contain any message at all.

In objecting to most of these activities, plaintiff has not argued that his governmentally required dues are being spent in a manner which compels his support of some belief, ideology, or position which is repugnant to him or on which he would prefer to remain silent. Rather, for the most part, plaintiff has argued that his governmentally required dues are spent in a manner which returns no economic benefit to him. If such an argument has a constitutional base, it is not in the First Amendment.

Even if the activities could be characterized as encompassing some ideological content, any asserted connection with plaintiff would be too attenuated to constitute a burden on the freedom of conscience that underlies negative First Amendment protection.

For example, plaintiff's objections to the food and drink served at social functions of the bar could conceivably be framed as an objection to a compelled expression of support for a religious message. However, if such compelled expression is present, it does not have the intimate connection with plaintiff that is necessary for it to reasonably be seen as an invasion of plaintiff's freedom of conscience. Plaintiff is not being forced to consume the food, nor is he being forced to attend the functions at which it is served. Compare *Barnette* and *Wooley, supra.* No reasonable person could attribute a religious message to plaintiff by virtue of the fact that a small portion of his mandatory bar dues is used to purchase pork or shellfish for consumption at cocktail parties sponsored by the

bar. The connection between plaintiff and any conceivable message is simply too attenuated to be protected by the First Amendment. See *Lathrop, supra* (Harlan, J., *concurring),* and *Prune Yard, supra,* pp 87-88.

Alternatively, we find that the non-political activities challenged by plaintiff are fairly within the normal functions of an integrated bar. The concept of an integrated bar was constitutionally validated in *Lathrop.* Thus, the activities discussed here share in that validation. *Cf. Abood, supra,* pp 222-223 (activities which promote the cause which justified bringing the group together are permissible).

We hold therefore that plaintiff has failed to identify a protected First Amendment interest in connection with the use of his mandatory dues to support the non-political activities of the Young Lawyers Section and the Lawyers Wives. In addition, we hold that plaintiff has not shown that bar expenditures used to promote prepaid legal services, to provide lawyer placement services, or to conduct social functions violate his First Amendment rights.

B. Political Activities

Plaintiff's challenge to the use of his mandatory dues in connection with the political activities of the bar requires a more complete application of the constitutional test. Plaintiff objects to several aspects of the political activity of the bar. He objects to the technical expertise which the bar provides to the state Legislature by assisting in drafting legislation and giving advice to the Legislature on the substantive content of the law. Plaintiff also objects to the bar's lobbying activity as conducted in the Legislature and in appearances before the State Officers Compensation Commis-

sion. Specifically, plaintiff claims that when the bar takes a position in support of or opposition to a piece of legislation, it infringes on his negative First Amendment interest to remain silent on that issue.

The first step in the constitutional test is to determine if the government action infringes upon a protected First Amendment interest. Plaintiff has carried his threshold burden of proof in connection with the bar's political activities. The bar's legislative and political involvement clearly involves a message. By rendering advice on content or supporting or opposing legislation, the bar engages in expression. To the extent that plaintiff's mandatory dues are used to support such activity, plaintiff is compelled to participate in such expression. Even if plaintiff is opposed to the bar's position, or would choose to take no position at all, he is forced to contribute to the advancement of the bar's position. His freedom of conscience and intellect have been invaded.

Plaintiff has thus suffered some cognizable First Amendment related injury. It remains to be seen, however, whether plaintiff is protected from that injury in connection with this government activity.

The next step in determining the answer to this ultimate question is to further analyze the nature of plaintiff's injury to determine its severity. As described above, the key factor in this analysis is the intimacy of the connection between plaintiff and the compelled expression.

This is not a case where plaintiff is being forced to personally express his own agreement with the political positions of the bar. Compare *Barnette, supra.* Plaintiff is also not being forced to display the bar-approved message in his home or on his automobile. Compare *Wooley, supra.* Plaintiff is

free to take a public position which is directly opposed to that taken by the bar. See *Prune Yard, supra.* Plaintiff is required only

"to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor". *Lathrop, supra,* p 858 (Harlan, J., *concurring).*

Thus, although the government action complained of here has in fact infringed upon plaintiff's First Amendment interests, the severity of the injury is not great. Plaintiff is required to support the legislative positions taken by the bar only through indirect financial contributions. Reasonable persons are not likely to associate the bar's expressed position with plaintiff merely because he is forced to pay dues to the bar in order to practice law. Thus, the invasion of plaintiff's freedom of conscience and sphere of intellect occasioned by the bar's political activity is, in reality, not great.

Our next task is to weigh the government's interest in the bar's political activity to determine whether it outweighs this First Amendment injury. There can be little doubt that the government has an interest in receiving the input of the State Bar into the legislative process. The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing, and interpreting the law.

In this sense, the State Bar is quite different from the labor union involved in *Abood.* It is true that the government might have a keen interest in the legislative participation of a labor union in specialized areas of the law touching directly on

the field of employment of the union members or on the area of collective bargaining. But lawyers are involved with the law in almost all its forms. Therefore, their input is of broader interest to the Legislature.

In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature. Certainly, the Legislature is greatly aided by the collective wisdom of the practitioners who make up the Taxation Section of the bar when it revises state taxation provisions. Similarly, the input of the Criminal Law Section is invaluable to the Legislature in its task of revising Michigan's Criminal Code.

In addition, the government has an interest in hearing the collective majority opinion of the bar on the matter of judicial compensation. Members of the bar are best able to inform the State Officers Compensation Commission what level of compensation is required in order to attract and keep qualified lawyers on the bench.

State Bar Rule 1 provides:

> "The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State." 340 Mich xxxviii.

The political lobbying and input currently conducted by the State Bar of Michigan clearly serves those purposes.

As the foregoing discussion indicates, the government has a substantial interest in the political activity of the bar. Although this activity infringes upon plaintiff's negative First Amendment inter-

ests, we believe the government interest in the activity outweighs plaintiff's injury. We therefore hold that the State Bar of Michigan may constitutionally use the mandatory dues of its members to support the lobbying and other legislative activities of the State Bar as they are currently conducted.

IV. CONCLUSION

Plaintiff has failed to establish his right to relief in connection with any of the undecided constitutional challenges raised by his complaint and briefs. Therefore, plaintiff's request for relief is denied.

No costs, a public question being involved.

WILLIAMS, C.J., concurred with BOYLE, J.

KAVANAGH, J. Justice LEVIN expressed our view in *Falk v State Bar,* 411 Mich 63, 166-167, fn 1; 305 NW2d 201 (1981):

"Falk commenced this action as an original proceeding in this Court denominating it 'Petition for Special Relief'. No statute or court rule expressly authorizes such a petition. If the petition were an ordinary lawsuit claiming violations of Falk's constitutional rights, it should have been filed in a circuit court. If regarded as an action for a writ of mandamus against a state officer, it should have been commenced in the Court of Appeals, or the circuit court for Ingham County or other county in which venue was proper. MCL 600.4401; MSA 27A.4401. This Court has elected to treat Falk's petition as a request to exercise the Court's statutory power to regulate the conduct and activities of the bar. MCL 600.904; MSA 27A.904.

"As such, this proceeding is more in the nature of a rule-making proceeding than a lawsuit; what character it has as a lawsuit is the result of this Court's action in

appointing a judge to conduct a hearing and make findings of fact.

"Since this is not a lawsuit, or even an action whose procedure is delineated by statute, court rule or precedent, it is inappropriate to limit our consideration of the issues presented in this proceeding according to the rules circumscribing lawsuits. To determine the scope or content of an order regulating the bar according to burdens of proof or inadequate showings in the record we ordered would be to treat this proceeding as the lawsuit it clearly is not."

While we are edified by the scholarly opinions of our colleagues, we are still persuaded that we should await a proceeding wherein it is necessary for decision to reach the constitutional issues. Accordingly, we express no opinion thereon, but wholeheartedly join in the Court's disposition of this proceeding.

LEVIN, J., concurred with KAVANAGH, J.

RYAN, J. In our previous consideration of this case,[1] we examined the extent to which an individual attorney may be required, over his First Amendment[2] objections, to pay dues to and associate himself with the integrated State Bar of Michigan. Three opinions resulted, but there was no majority for final disposition of the case.

Two members of the Court, Justice WILLIAMS and Chief Justice COLEMAN, were of the opinion that the plaintiff was entitled to no relief and would have denied his petition. Justices LEVIN and KAVANAGH were of the opinion that, while some of

[1] *Falk v State Bar of Michigan*, 411 Mich 63; 305 NW2d 201 (1981).

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." US Const, Am I.

the issues before the Court might have been resolved on the record as presented, others required further factual development. In an opinion signed by Justice FITZGERALD and the late Justice MOODY, I expressed the view that, while the plaintiff was entitled to partial relief and that such relief should have been ordered, several issues could not be decided without further factual development. While Justice LEVIN and I differed as to specific bar association activities which needed further record explication, a majority of the justices agreed that the matter should be remanded to the Honorable James H. Lincoln for an evidentiary hearing to develop a more complete record with regard to the following activities of the bar association:

"(1) the Young Lawyers Section and Lawyers Wives,
"(2) the Lawyer Placement Service,
"(3) the commercial sale of the bar's mailing list, and
"(4) bar activities addressed to influencing legislation." 411 Mich 63, 83; 305 NW2d 201 (1981). (Numeration added.)

Extensive hearings were held for 12 days between August 24, 1981, and December 18, 1981. Eighty-three witnesses testified and numerous exhibits were introduced. Since we have the benefit of a supplemental record, we may now dispose of the originally stated issue.

Upon careful examination of the record as augmented, and after reconsideration of our prior opinions as well as the briefs and arguments of the parties, we adhere to my previous opinion and the holding therein that:

"The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the

State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected." *Id.*, p 84.

Before addressing the particular activities for which a remand was made, a brief summary of the facts and my previously expressed views is in order.

I

Plaintiff Allan Falk filed a pleading in this Court on November 30, 1977, entitled "Petition for Special Relief", naming the State Bar of Michigan as defendant, thereby initiating an original proceeding in this Court. He claimed that many of the expenditures of the State Bar of Michigan, to which he must belong and pay dues, violated his First Amendment rights. I found it uncontroverted that the State Bar financed, in varying measure, certain bar activities to which the plaintiff objected, including legislative lobbying, the Prepaid Legal Services program, the Lawyer Referral Service programs, the Lawyer Placement Service, and the Client Security Fund.

After analyzing several decisions of the United States Supreme Court, I concluded that the result in *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), provided the constitutional framework for the views I expressed. *Abood* was read as holding:

"(1) that, as in *Hanson [Railway Employees' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956)], the State of Michigan's authorization of agency shop agreements in the public sector served a sufficiently

compelling state interest in the achievement of labor stability to permit impingement on public employees' First Amendment rights to the extent of requiring payment of service fees for purposes germane to the collective bargaining duties of the teachers' union; and (2) that to the extent that agency fees were exacted and used for purposes beyond or apart from those activities related to collective bargaining, the plaintiffs had stated a claim upon which relief could be granted under the First Amendment." 411 Mich 105. (Footnote omitted.)

Unfortunately, *Abood* failed to clearly indicate its analytical basis, depending more on its similarity to earlier decisions than on a particular test. Consequently, I relied upon *Elrod v Burns*, 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976), which clearly employed the traditional "less intrusive means" balancing approach, applying it to the First Amendment area of freedom of association and freedom of belief, both of which were also implicated in *Abood*, 411 Mich 111. Under this test, First Amendment values may be impinged upon only when the infringement serves a compelling state interest which cannot be accomplished by less intrusive means.

After an explication of the relevant principles of law and consideration of the record presented, the opinion concluded with specific findings of fact and conclusions of law. Of signal importance was the finding that "the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are * * * purposes in which the State of Michigan has a compelling interest" justifying "unavoidable intrusions on the First Amendment rights of objecting attorneys". 411 Mich 114.

I also concluded that the State of Michigan had shown a compelling state interest in certain func-

tions of the bar which could not be advanced by less intrusive means. These consisted of all regulatory activities, all continuing legal education activities, the publication of the Michigan Bar Journal *to the extent* it is devoted to informing members on current matters related to regulation of the profession and the improvement of professional standards, the Client Security Fund, activities designed to educate the public concerning the use of legal services and the relationship between individuals and the legal system generally, and activities designed to make legal services more accessible such as the Lawyer Referral Service and legal aid organizations.

On the other hand, the political and legislative activities of the bar were held to be impermissible intrusions upon First Amendment rights. Legislative or policy choices are the result of ideological beliefs, and such beliefs, and association to promote or oppose such beliefs, are essential values protected by the First Amendment. Given the alternatively "less intrusive" methods available to the Legislature to obtain expert legal advice, such functions were held not to serve a state interest identified as compelling.[3]

Similarly, activities designed to further the commercial and economic interests of the members of the bar were found to be improper, since they do not serve compelling state interests such as those identified. Thus, activities such as lawyer placement were held to violate the plaintiff's First Amendment rights.

Nothing which has been presented in the supple-

[3] For example, just as it is inappropriate for the State Bar to adopt and publish an official position on proposed legislation, it is also improper for it to devise legislation and arrange to have it proposed. Our prior disapproval of a professional lobbyist would imply this result as well.

mental record, or advanced in the briefs and oral arguments, or discovered upon reconsideration of my colleagues' written opinions has persuaded me to alter my original views, and they are, therefore, reaffirmed.

We find it unnecessary and unproductive to examine in this opinion every activity of the State Bar, including those of the bar's numerous committees, to determine whether they serve a compelling state interest in an unavoidably intrusive manner. Rather, we rely upon my earlier comments on the inappropriateness of political and legislative activities and those designed to promote commercial and economic interests, as opposed to those serving an educative or regulatory function as previously identified, to provide sufficient standards to determine whether specific bar activities pass or fail the petitioner's First Amendment challenge.

Attention is particularly invited to findings and conclusions Nos. 10 and 11 of my prior opinion, 411 Mich 116-118, wherein two of the bar activities which my colleagues thought required further evidence and record explication, the political and legislative activities of the bar and the Lawyer Placement Service, were discussed and found to be constitutionally unsustainable.

However, we will specifically examine those activities enumerated in the Court's remand order which have not already been addressed.[4] Given the supplemental record, we conclude that:

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[4] It is also unnecessary for us to address all of plaintiff's arguments. Some have already been discussed and others have been answered implicitly.

For example, plaintiff objects to unpaid solicitations in the Michigan Bar Journal for LAWPAC (Lawyers Political Action Committee), the political arm of the State Bar of Michigan. He sees it as a "backdoor method of using compulsory dues" to finance LAWPAC. We agree that such a use of the Bar Journal is improper. This conclusion logically follows from our disapproval of political and

The Bar's Mailing List

1. The parties have agreed and we find that the issue concerning the commercial sale of the bar's mailing list is moot. The State Bar offers members the opportunity to remove their names from the mailing list being used for commercial purposes. No right of privacy or First Amendment issue need be decided.

The Young Lawyers Section

2. Although membership in the Young Lawyers Section is still "automatic" by virtue of age or years since admission, the State Bar clearly gives notice to all members upon admission, and periodically in the Bar Journal and in Inter Alia, the Young Lawyers Section publication, that they may disassociate themselves. We agree that the issue of *compelled* membership in the Young Lawyers Section is, therefore, likewise moot and need not be examined further.

Because the bar provides a measure of financial support to the Young Lawyers Section, however, its activities must be examined under the same principles as any bar activity. Here we specifically adopt Judge Lincoln's finding. Those activities that are legislative or political, or designed primarily to further the economic opportunities of "young" lawyers, are impermissible. In particular, those activities of the State Bar Juvenile Law Committee which include, among other things, rendering advice to the House of Representatives and proposing enactment of a revised juvenile code are politi-

legislative activities by the bar, 411 Mich 116, as well as our approval of the Bar Journal as a bar activity when *limited* to matters on regulation of the profession and the improvement of professional standards. *Id.*, p 115.

cal or legislative in nature.[8] On the other hand, purely educative activities by the Child Advocacy Committee are "directed to the maintenance of high professional standards among Michigan attorneys" and, as such, are not prohibited. 411 Mich 115.

The funding of Prison Legal Services of Michigan, Inc., which provides free legal counsel to Michigan prisoners in civil matters, as well as the Committee for Provision of Legal Services to the Elderly, are activities designed to make legal services more accessible. As indicated originally, "[t]hese activities represent a part of the service every attorney owes the public and hence compelling support for them cannot be deemed constitutionally obnoxious". *Id.*, p 116.

One final activity of the Young Lawyers Section that cannot be continued as presently conducted is the Prepaid Legal Services Committee. To some extent, promotion and development of such plans make legal services more accessible and promote the discharge of the profession's duty to protect and inform the public. Yet, the plans differ in a constitutionally significant way from the Lawyer Referral Service or the service of the legal aid organizations. Prepaid legal service plans benefit a narrow category of individuals; only those who can afford such a plan and who have contracted for it may use its services. The Lawyer Referral Service, however, benefits any member of the public who

[8] In addition to the testimonial record and exhibits produced at the hearing upon remand, we have considered the summary of the testimony by plaintiff Falk which was submitted in his brief on reargument as his Statement of Facts. Plaintiff's brief was filed long before defendant's, yet defendant failed to file a counter-statement of the facts or to contest the summary. See GCR 1963, 814.2, 854. Thus, defendant is taken to have accepted plaintiff's summary. Our acceptance of plaintiff's statement, however, does not imply acceptance of any opinions or conclusions which might have been incorporated in the summary.

requests the name of a lawyer. Any citizen who is in need of legal advice can contact the referral service, but he can avail himself of the prepaid plan only if he has a contract for such services.

Prepaid legal service plans differ from legal aid not in the number of potential beneficiaries, but in the cost of services. Legal aid is charitable in character; legal service plans are designed as profit-making enterprises. The distinguished chairman of the Prepaid Legal Services Committee testified that he became involved in the bar program to promote and develop prepaid legal service plans out of fear of losing clients to automobile manufacturers and labor union prepaid service plans—out of fear of losing income. Such plans are primarily designed to further the altogether legitimate economic interests of lawyers, despite the incidental benefit of making legal services more accessible to the middle class. Since prepaid legal service plans are designed *primarily* to further lawyers' economic interests rather than make legal services more accessible to the public in general, or those without money, they serve no compelling state interest.

Lawyers Wives of Michigan

3. The State Bar asserts that the Lawyers Wives of Michigan, as an adjunct to the State Bar, is designed to "educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally". 411 Mich 115. The supplemental record indicates that the activities of the Lawyers Wives organization include art exhibits, essay contests, brochures, publications such as "You and the Law", and Law Day activities designed to promote public education. The mere fact that Law Day may be a

substitute for International Labor Day ("Red May Day") and thus may have political overtones is unsubstantiated and, in any event, irrelevant. Law Day activities are designed to educate the public about our legal system, not incite rebellion. Consequently, under the standard quoted above, the Lawyers Wives organization is a constitutionally permissible activity.

4. All the activities for the consideration of which remand was ordered have been examined by this Court either in my previous opinion or in this one.

Consequently, we would grant the relief as announced in my original opinion, but modified to take account of the final character of the disposition of the case. We would order:

a. That the State Bar be enjoined from disbursing compulsorily exacted dues for any functions or purposes other than those described in findings and conclusions No. 9A to 9F of my prior opinion, 411 Mich 114-116, and conclusions Nos. 2 and 3 above, and that the bar poll its members to identify those willing to support such other activities on a voluntary basis and permit solicitation of contributions from those members for such purposes.

b. That the State Bar of Michigan determine the proportion of dues paid by each member which does not relate to the above-declared and aforementioned constitutional purposes and functions, and that the amount of dues as of and after October 1, 1983, the beginning of the fiscal year of the State Bar of Michigan be reduced accordingly.

c. That plaintiff Allan Falk be advised of the portion of his excused bar dues which relates to the purposes of the State Bar described in findings and conclusions No. 9A to 9F of our first opinion,

411 Mich 114-116, and conclusions Nos. 2 and 3 above, and that he pay to the State Bar that amount within 30 days after he is so notified.

BRICKLEY and CAVANAGH, JJ., concurred with RYAN, J.

FIRST OPINION
State of Michigan
In the Supreme Court

ALLAN FALK -v- STATE BAR OF MICHIGAN

PER CURIAM. This matter comes before this Court pursuant to plaintiff's "Petition for Special Relief". In his petition the plaintiff sets forth his objections to a number of State Bar activities and asks that the petition "be granted".

Based on the record we have before us, three members of the Court are of the view that the plaintiff is entitled to partial relief and would order it to be afforded. Several issues, however, cannot be decided without further development.

Two members of the Court are of the opinior

that the plaintiff is not entitled to relief and would deny the petition.

Two members of the Court are of the view that further hearings on this matter are required, believing that the present state of the record is such that while some of the issues could be resolved based upon an evaluation of the record, several other issues should not be decided without further development.

In light of these circumstances, there being no majority of the Court at this time for a decision which would determine this matter, we order that the Honorable James H. Lincoln be appointed to conduct an additional evidentiary hearing. At this hearing the parties shall further develop the record with regard to the following bar activities: the Young Lawyers Section and Lawyers Wives,[1] the Lawyer Placement Service, the commercial sale of the bar's mailing list, and bar activities addressed to influencing legislation.

The hearing on remand shall be concluded not later than July 31, 1981 and the transcript thereof filed with the Clerk of this Court within 60 days after conclusion of the hearing. Thereafter the plaintiff shall file any additional brief he wishes to present for consideration within 30 days of the filing of the transcript and the State Bar shall file any responsive brief within 60 days of the filing of the transcript.

A majority of the Justices are in favor of the action directed by this opinion. All of the Justices agree that, there being a majority for this action, an order to effectuate these directions shall be issued.

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[1] No further evidence need be taken with regard to the preparation and distribution of the Juror's Manual, the distribution of the "You and the Law" booklet, and funding of the Children's Charter.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

RYAN, J. The issue in this case is:

To what extent, if any, may this state, through the combined actions of the Supreme Court, the Legislature, and the State Bar, compulsorily exact dues for, and require association in, an integrated bar organization over the First Amendment[1] objections of an affected individual attorney?

We would hold:

The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected.

I. FACTUAL BACKGROUND

A

This case was commenced as an original proceeding in this Court on November 30, 1977 when plaintiff attorney Allan Falk filed a pleading entitled "Petition for Special Relief" which named the State Bar of Michigan as the defendant.

The plaintiff's petition is a three-page document which sets forth a series of factual allegations and

[1] The First Amendment of the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

legal assertions expressing his First Amendment objections to various activities and expenditures of the State Bar of Michigan, to which he must belong and pay dues. While Mr. Falk brings an unusual, and relatively complex, claim to this Court, we find that his petition bears at best only a remote resemblance to a complaint under our court rules, GCR 1963, 101, 111. The petition certainly contains allegations that various activities and expenditures of the State Bar violate the plaintiff's First Amendment rights.[2] However, we are unable to discern the statement of any other claim or cause of action.[3] Further, the demand for

[2] Mr. Falk's petition makes reference to the United States Supreme Court's decision in *Abood v Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), *reh den* 433 US 915; 97 S Ct 2989; 53 L Ed 2d 1102 (1977).

[3] Mr. Falk's briefs include discussion and argument relating to a tortious invasion of his privacy which he contends is caused by the State Bar's alleged distribution of its membership lists, with addresses, to various commercial entities for use in mail solicitation efforts.

Mr. Falk's original pleading nowhere states a claim, or requests relief, for tortious invasion of privacy. See GCR 1963, 111.1, 117.2(1). Adequate proofs were not presented to the fact-finder on such a claim. Further, at oral arguments, Mr. Falk acknowledged that he had never requested the State Bar to refrain from so distributing his name and address.

Since we find that no claim was pled for invasion of privacy, no relief requested, and inadequate proofs offered, we will not reach the issue, and we intimate no opinion as to its merit, if any.

Similarly, Mr. Falk's brief discusses an asserted violation of his First Amendment rights to religious freedom under the following heading:

"The use of State Bar dues monies to purchase alcoholic beverages, pork and shellfish for consumption at social functions, particularly when not all State Bar members are invited to such functions or offered alternatives of equal value for dues paid, and which are unnecessary to the accomplishment of any goal central to the viability of the State Bar as a regulatory body, violates the rights of petitioner and other State Bar members under the free exercise and establishment of religion clauses of the First Amendment."

Mr. Falk characterizes the referenced State Bar social functions as "bacchanalian revelries" which are unnecessary to the furtherance of the constitutionally permitted objectives of the State Bar.

Here again, the petition neglects to state any claim, or seek any

judgment or relief (see GCR 1963, 111.1[3]) requests only that the "petition for special relief be granted".[4] We treat the petition as a complaint for a writ of superintending control over the State Bar of Michigan, within our original jurisdiction pursuant to GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219. We further interpret the petition as seeking an order from this Court relieving the plaintiff of the obligation of paying the pro rata portion of his State Bar dues which relates to alleged "unlawful and unconstitutional activities".

Our role under these unusual circumstances is comparable to that of a trial court, responsible for making the appropriate factual determinations

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relief, for violation of the plaintiff's First Amendment religious freedoms. For that reason, and also because we are satisfied that our disposition of this case renders moot the freedom of religion issues intimated by Mr. Falk, we do not reach the merits of those asserted First Amendment infringements.

[4] Mr. Falk's briefs, but not his petition, also request that all members of the State Bar be notified, through the State Bar Journal, of their right to "opt into" this lawsuit and obtain like relief. The pendency of this action has been reported in the Michigan State Bar Journal. See 57 Mich State Bar J 224-225 (March, 1978). As of the date of the issuance of this opinion, no other member of the State Bar has "opted into" this suit. See GCR 1963, 209.

Mr. Falk, again in his briefs, and not his pleading, further requests that he be granted an attorney's charging lien on all of the dues that might be refunded in this action. It appears from the record that Mr. Falk has been excused of his obligation to pay any bar dues during the pendency of this action. This fact, coupled with the absence of any intervening plaintiffs, combine to result in the generation of no pool of bar dues refunds upon which such a lien could be imposed. Instead, our decision today requires Mr. Falk to pay that portion of his excused bar dues which relates to the constitutional purposes of the bar.

It should also be noted that this action was filed by Mr. Falk solely on his own behalf. He has expressed his belief that a Michigan Court of Appeals decision, *Ball v Detroit*, 84 Mich App 383, 398; 269 NW2d 607 (1978), authoritatively precluded the filing of an original class action in this Court in this case. Because of Mr. Falk's decision to not so proceed, we are not presented with any issue relating to the applicability of the Court of Appeals *Ball* decision in this action, and we therefore intimate no opinion as to the correctness of the plaintiff's understanding of *Ball*.

and applicable conclusions of law in reaching a judgment resolving the claims presented.

Subsequent to the filing of Mr. Falk's petition, this Court entered an order appointing former Judge Maurice E. Schoenberger to conduct a hearing and make findings of fact on the issues presented in this case. 402 Mich 960 (1978).

On June 5 and 6, 1978, the hearing was held, and both parties presented testimony relating to the various activities and functions of the State Bar. A transcript of the hearing is part of the present record. On September 29, 1978 Judge Schoenberger submitted his report to this Court. The report summarizes the presentations of the State Bar and Mr. Falk, lists the exhibits received into evidence at the hearing, and concludes that there are no controverted factual matters which require resolution.

Thereafter, plaintiff Falk filed a brief, a reply brief, and a supplemental reply brief. The defendant State Bar filed a brief in opposition and a motion to file an answer to plaintiff's supplemental reply brief which contained the answering brief. All of this material has been considered by this Court. Finally, pursuant to our order of April 6, 1979 oral arguments were heard on June 5, 1979. 406 Mich 1117 (1979).

A review of the record establishes certain salient facts relating to plaintiff Falk's claim. One of those uncontroverted facts is that the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, compels all licensed attorneys to associate in and provide financial support for the integrated State Bar. Another uncontroverted fact is that the State Bar engages in various lobbying efforts in the Legislature, and that such efforts are financed, at least in part, by

the compulsorily exacted dues of the Bar's members. It is likewise undisputed that compulsory bar dues are used to finance other activities which plaintiff contends are non-regulatory in nature, such as the Prepaid Legal Services programs, Lawyer Referral Service programs, the Lawyer Placement Service, and the Client Security Fund.

B

The integrated State Bar of Michigan was legislatively authorized by 1935 PA 58.[5] Thereafter, this Court, in cognizance of the legislation and pursuant to its own inherent power to regulate the practice of law in this state,[6] entered an order

[5] That act provided, in its entirety:

"AN ACT to create the state bar of Michigan; and to authorize the supreme court to provide for the organization, regulation and rules of government thereof.

"The People of the State of Michigan enact:

"Sec. 1. There is hereby created an association to be known as the state bar of Michigan, the membership of which shall consist of all persons in the state now or hereafter regularly licensed to practice law in this state.

"Sec. 2. The supreme court is hereby authorized to provide for the organization and regulation of the state bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein, which dues shall not exceed five dollars per annum, nonpayment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members. Under such regulations and restrictions as the supreme court may prescribe, the power of subpoena may be conferred upon the association or its officers and committees for the purpose of aiding in the cases of discipline, suspension or disbarment; the rules promulgated by the supreme court and the proceedings and records of the state bar association to be published by the judicial council of Michigan and in the Michigan reports and advance sheets thereof."

See also 1947 PA 34; 1948 CL 601.48, 601.61, 691.51, 691.52; 1961 PA 236, §§ 901, 904; MCL 600.901, MSA 27A.901; MCL 600.904; MSA 27A.904.

[6] See const 1963, art 6, § 5; *In the Matter of Mills, an Attorney*, 1 Mich 392, 393-394 (1850); *In re Hartford*, 282 Mich 124; 275 NW 791 (1937); *In re Schlossberg v State Bar Grievance Board*, 386 Mich 389, 395; 200 NW2d 219 (1972).

organizing, and promulgating rules concerning, the integrated bar.

Section 1 of the first Supreme Court Rules Concerning the State Bar provided:

"The State bar of Michigan is the association of the members of the bar of this State, organized pursuant to powers of the Supreme Court over the bar of the State. The association shall, under these rules, aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this State."[8]

This original declaration of the purposes of the integrated bar has not been materially altered by any restatement in the subsequent 44 years.[9]

At all times since the formation of our integrated State Bar, all actively practicing lawyers in this state have been required to be members of,[10] and pay dues to,[11] that organization.

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[7] 273 Mich xxxv (1935).

[8] *Id.*

[9] See 340 Mich xxxviii (1954) for the text of current State Bar Rule 1.

It is here worthwhile to consider the analysis of the integrated bar's purposes which was expressed by its first president, Roberts P. Hudson, in his "message from the President" which appeared in 15 Mich State Bar J 7-8 (1936):

"Your organization is designed not only for the benefit and betterment of its members, but primarily for the public at large who require the services of the profession. It must never be subservient to political dictation or intimidation, nor control from outside its membership. It cannot represent the interests of any group or political faith. It must not draw distinctions of color, race or creed. It must not submit to politically minded leadership. It must not stand aloof from its membership. It must purge itself of the unfit. It must not recognize geographic boundaries. It is now and must remain democratic, independent and representative of the best ideals of citizenship."

[10] Supreme Court Rules Concerning the State Bar of Michigan, §§ 2 and 3; now State Bar Rules 2, 3.

[11] Supreme Court Rules Concerning the State Bar of Michigan, § 4; now State Bar Rule 4.

There can be no question that since 1935 the privilege of practicing law in this state has been conditioned upon association with, and financial support of, the integrated State Bar of Michigan compelled by the state.

II. RELEVANT UNITED STATES SUPREME COURT DECISIONS

Our analysis of Mr. Falk's claim under the First Amendment is controlled, of course, by the applicable decisions of the United States Supreme Court. We therefore here undertake the task of presenting our understanding of certain United States Supreme Court decisions which are implicated by Mr. Falk's claims and the State Bar's response.

A. Hanson, Street, and Lathrop

In *Railway Employes' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956), non-union employees of a railroad brought suit in a Nebraska state court against the railroad and various unions representing the railroad's employees seeking to enjoin anticipated enforcement of a union shop[12] agreement entered into between the railroad and the unions. The contract required that all employ-

[12] A union shop agreement requires that all affected employees must actually join the union, maintain their membership, and pay union dues, as a condition of their employment.

An agency shop agreement is one under which affected employees are not required to actually become members of the union, but are required to pay "service fees" bearing a relationship to union dues to help defray the collective bargaining costs of the agent-union which acts as the exclusive bargaining agent of all affected employees, union members and non-members alike. See, generally, 48 Am Jur 2d, Labor and Labor Relations, §§ 12-20, 355-356, 361; pp 86-93, 273-275, 278-279; 48A Am Jur 2d, *id.*, § 1904, p 324. See also *Abood v Detroit Board of Education*, *supra*, 431 US 217, fn 10.

ees of the railroad become members of the specified union as a condition of their employment.

The union shop agreement was permissively authorized by the Federal Railway Labor Act. That act authorized union shop agreements "notwithstanding the law of 'any State'". 351 US 228.

The Nebraska state constitution contained a "right to work" provision which outlawed union shop agreements.

The Nebraska trial court enjoined enforcement of the agreement. The Nebraska Supreme Court affirmed, holding that the union shop agreement violated the First Amendment in that it deprived employees of their freedom of association, and violated the Fifth Amendment,[13] in that it required members of the union to pay for activities above and apart from the costs relating to collective bargaining. The Nebraska Supreme Court concluded that the relevant provisions of the Railway Labor Act were unconstitutional under the Federal constitution, and therefore did not supersede the Nebraska state constitution's right to work provision. 160 Neb 669; 71 NW2d 526 (1955).

The United States Supreme Court, in an opinion authored by Justice Douglas, reversed. While the Court's decision in *Hanson* has been accorded varying interpretations in later cases, we believe that *Hanson* narrowly held: (1) that Congress' bare authorization of union shops was within the consti-

[13] US Const, Am V provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

tutional realm of legislative policy making under the Commerce Clause,[14] in pursuit of labor peace; and (2) that the *Hanson* record did not present any concrete, justiciable First Amendment issues relating to the union shop agreement's potential impairment of freedom of expression or forcing of ideological conformity, since the action had been commenced before the effective date of the agreement.[15] 351 US 238.

In *International Ass'n of Machinists v Street*, 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961), a union shop agreement entered into under the Railway Labor Act was challenged by objecting railroad employees.

The employees brought an action in a Georgia state court alleging that substantial portions of their compulsory union dues were being used to finance the campaigns of political candidates, and to advance the propagation of political and economic doctrines to which the plaintiffs were opposed. The agreement in *Street* was in effect at the time the action was brought and a concrete record was therefore presented.

The state trial court entered a judgment for the plaintiffs, enjoining enforcement of the agreement to the extent that it permitted the use of dues for political purposes and the propagation of ideologies which the plaintiffs opposed.

The Georgia Supreme Court affirmed. 215 Ga 27; 108 SE2d 796 (1959).

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[14] US Const, art I, § 8, cl 3.

[15] Of interest in Justice Douglas' *Hanson* opinion is the following statement:

"On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 US 238.

Justice Douglas later disavowed the analogy. *Lathrop v Donohue*, *supra*, 367 US 879. See also *Abood v Detroit Board of Education*, *supra*, 431 US 246, fn 1 (Powell, J., concurring).

On appeal, the United Stated Supreme Court, in an opinion by Justice Brennan signed by four Justices, with two additional Justices concurring in the decisional analysis, reversed and remanded for further proceedings.

Justice Brennan's opinion considered the *Hanson* decision at length. The inadequacy of the *Hanson* record with respect to the justiciability of the possible First Amendment issues was emphasized. *Hanson* was read as only reaching the facial constitutionality of the Railway Labor Act's authorization of union shop agreements:

"In their brief in this Court the appellees in Hanson argued that First Amendment rights would be infringed by the enforcement of an agreement which would enable compulsorily collected funds to be used for political purposes. But there was nothing concrete in the record to show the extent to which the unions were actually spending money for political purposes and what these purposes were, nothing to show the extent to which union funds collected from members were being used to meet the costs of political activity and the mechanism by which this was done, and nothing to show that the employees there involved opposed the use of their money for any particular political objective. In contrast, the present record contains detailed information on all these points, and specific findings were made in the courts below as to all of them. When it is recalled that the action in Hanson was brought before the union-shop agreement became effective and that the appellees never thereafter showed that the unions were actually engaged in furthering political causes with which they disagreed and that their money would be used to support such activities, it becomes obvious that this Court passed merely on the constitutional validity of § 2, Eleventh of the Railway Labor Act on its face, and not as applied to infringe the particularized constitutional rights of any individual. On such a record, the Court could not have done more, consistently with the re-

straints that govern us in the adjudication of constitutional questions and warn against their premature decision. We therefore reserved decision of the constitutional questions which the appellees present in this case. We said: "It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record * * * if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. *We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.*" *Id.* 351 US 238. See, also, 351 US 242 (concurring opinion). *Thus all that was held in Hanson was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents.* We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which 'all employees shall become members of the labor organization representing their craft or class.' *Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees.*" (Footnote omitted, emphasis supplied.) 367 US 747-749.

Finding the *Street* record sufficiently concrete to present the issues not decided in *Hanson*, the Court went through an exhaustive analysis of the legislative histories of various Federal railroad labor acts, and then delivered the following construction of the Railway Labor Act's union shop provision:

"We give § 2, Eleventh the construction which achieves both congressional purposes when we hold, as we do, that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.

"We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. We do not understand, in view of the findings of the Georgia courts and the question decided by the Georgia Supreme Court, that there is before us the matter of expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders,' and the expenditures to support union political activities. We are satisfied, however, that § 2, Eleventh is to be interpreted to deny the unions the power claimed in this case. The appellant unions, in insisting that § 2, Eleventh contemplates their use of exacted funds to support political causes objected to by the employee, would have us hold that Congress sanctioned an expansion of historical practices in the political area by the rail unions. This we decline to do. Both by tradition and, from 1934 to 1951, by force of law, the rail unions did not rely upon the compulsion of union security agreements to exact money to support the political activities in which they engage. Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." (Footnotes omitted.) 367 US 768-770.

The *Street* opinion emphasized that the objecting employees' cause of action arose under the Railway Labor Act, and not the First Amendment, because the exactions complained of were not authorized by that statute. 367 US 771.

The foregoing interpretations of *Hanson* and

Street clearly indicate that neither case was decided on First Amendment grounds, although the delimiting language of that provision arguably implicitly compelled the results reached.

In *Lathrop v Donohue*, 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961), a companion case to *Street*, Wisconsin attorney Lathrop brought an action in a state trial court to recover compulsorily exacted dues paid by him to the integrated Wisconsin State Bar, alleging the requirement to pay such dues to be unconstitutional under the First and Fourteenth Amendments[16] of the United States Constitution. The treasurer of the Wisconsin State Bar was named as the defendant.

The defendant demurred to the complaint on three grounds, one of which was that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer on all three grounds, and then entered an order dismissing the complaint without leave to amend, for the reason that no amendment could cure the defects in the merits of the plaintiff's case. See 367 US 868-869 (Black, J., dissenting).

On appeal to the Wisconsin Supreme Court, the judgment of the trial court was affirmed. 10 Wis 2d 230; 102 NW2d 404 (1960). The Court held that the trial court was without subject matter jurisdiction to entertain the plaintiff's complaint, but went on to treat the complaint as if it had been originally filed in the reviewing court.

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[16] Section 1 of the Fourteenth Amendment of the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We read the Wisconsin Supreme Court's opinion as determining that the state had a sufficient interest in the achievement of the stated objectives of the integrated bar to justify the minimal compulsion of individuals effected by the requirement of association in, and payment of dues to, the integrated Wisconsin bar.

The United States Supreme Court, on appeal, divided sharply and entered a plurality judgment affirming the Wisconsin Supreme Court. That affirmance was later explained in *Abood v Detroit Board of Education*, 431 US 209, 233, fn 29; 97 S Ct 1782; 52 L Ed 2d 261 (1977), as follows:

> "In *Lathrop v Donohue*, 367 US 820, a companion case to *Street*, a Lawyer sued for the refund of dues paid (under protest) to the integrated Wisconsin State Bar. The dues were required as a condition of practicing law in Wisconsin. The plaintiff contended that the requirement violated his constitutionally protected freedom of association because the dues were used by the State Bar to formulate and to support legislative proposals concerning the legal profession to which the plaintiff objected.
>
> "A plurality of four Justices found that the requirement was not on its face unconstitutional, relying on the analogy to *Hanson*. And the plurality ruled, as had the Court in *Hanson*, that the constitutional questions tendered were not ripe, for the Court was nowhere 'clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities.' 367 US at 845-846. The other five Members of the Court disagreed with the plurality and thought that the constitutional questions ought to be reached. Three Justices would have upheld the constitutionality of using compulsory dues to finance the State Bar's legislative activities even where opposed by dissenting members. See *id.*, at 848 (Harlan, J., concurring in

judgment); *id.*, at 865 (Whittaker, J., concurring in result). The other two Justices would have held such activities to be unconstitutional. See *ibid.* (Black, J., dissenting); *id.*, at 877 (Douglas, J., dissenting).

"The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, *Lathrop* does not provide a clear holding to guide us in adjudicating the constitutional questions here presented."

It is clear from the foregoing that the United States Supreme Court did not resolve the merits of the constitutional issues raised by the plaintiff's arguments in *Lathrop*.

Although none of the three decisions discussed above was decided on First Amendment grounds, some analysis of them is necessary in order to fully understand the *Abood* decision, upon which Mr. Falk places considerable reliance.

B. Abood

In *Abood v Detroit Board of Education, supra,* the defendant board entered into a collective bargaining agreement with the Detroit Federation of Teachers, the certified exclusive representative of teachers employed by the board. The agreement implemented an agency shop[17] arrangement whereby all board-employed teachers were required to pay a service fee to the union as a condition of their employment, although they were not required to actually join the union.

Certain objecting teachers filed an action against the board, the union, and others, in circuit court

[17] See fn 12, *supra*.

alleging that the agency shop contract violated their First Amendment rights, in that the plaintiffs were opposed to collective bargaining in the public sector generally; and that the union was using the agency service fees to support ideological and political causes which were unrelated to collective bargaining activities and which were opposed by the plaintiffs.

The circuit court granted the defendants' motion for summary judgment,[18] finding the agency shop arrangement inoffensive to the plaintiffs' constitutional rights.

During the pendency of the plaintiffs' subsequent appeal from the summary judgment, this Court decided *Smigel v Southgate Community School Dist*, 388 Mich 531; 202 NW2d 305 (1972), which held that the Michigan public employment relations act (PERA), as then written, did not authorize or permit agency shop contracts in the public employment sphere.

The *Abood* application for leave to appeal then reached this Court. On the authority of *Smigel* the circuit court's summary judgment was vacated and the case was remanded to that court "for further proceedings consonant herewith", *sub nom Warczak v Detroit Board of Education*, 389 Mich 755 (1972).

The Legislature then amended PERA to expressly authorize agency shop contracts in the public sector. 1973 PA 25; MCL 423.210(1); MSA 17.455(10)(1).

On remand to the circuit court, the defendants filed a new motion for summary judgment based on the premise that the PERA amendment autho-

[18] The motion was brought pursuant to GCR 1963, 117.2(1), on the ground that the opposing party had failed to state a claim upon which relief could be granted.

rizing agency shops should be given retroactive effect (thereby effectively reversing *Smigel*). The circuit court granted the new summary judgment motion.

On appeal to the Michigan Court of Appeals, the trial court was reversed. *Abood v Detroit Board of Education*, 60 Mich App 92; 230 NW2d 322 (1975). The Court of Appeals held that the legislative amendment to PERA concerning agency shop agreements was prospective only. This holding would have been dispositive of the *Abood* case, since *Abood* involved a pre-PERA amendment agency shop agreement.[19]

However, the Court of Appeals went on to frame the following issue at 60 Mich App 98:

"Does the agency shop clause violate plaintiffs' First and Fourteenth Amendment rights securing freedom of speech and freedom of association?"

The Court of Appeals then discussed the United States Supreme Court's decisions in *Hanson* and *Street* and concluded:

"We have before us then, two powerful countervailing public policies. We are asked, on the one hand, to preserve freedom of expression, and, on the other, to promote labor stability. But freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded. This is particularly true where, as here, employees are compelled by the government to support the collective bargaining activities of an organization which they prefer not to join. Justice Douglas expressed this concern well in his concurring opinion in *Street*:

" 'If an association is compelled, the individual should

[19] See the United States Supreme Court's analysis on this point in *Abood v Detroit Board of Education*, 431 US 209, 216, fn 9; 97 S Ct 1782; 52 L Ed 2d 261 (1977).

not be forced to surrender any matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; and he should not be required to finance the promotion of causes with which he disagrees.' 367 US at 776 * * *.

"Therefore, we conclude that the agency shop clause, as prospectively authorized by the amendment to MCL 423.210; MSA 17.455(10), could violate plaintiffs' First and Fourteenth Amendment rights." 60 Mich App 100.

The record presented was, however, found to be inadequate to merit relief:

"To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection." 60 Mich App 102.

This Court subsequently denied leave to appeal from the Court of Appeals decision. 395 Mich 755-756 (1975).

On appeal to the United States Supreme Court, the judgment of the Michigan Court of Appeals was vacated and the case was remanded to the trial court for further proceedings.

The majority opinion framed the following issue:

"The issue before us is whether [the agency shop] arrangement violates the constitutional rights of government employees who object to public-sector unions

as such or to various union activities financed by the compulsory service fees." *Abood v Detroit Board of Education*, 431 US 209, 211.

The majority observed that "[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests", 431 US 222, and then considered the applicability of *Hanson* and *Street* to the *Abood* facts:

"The distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model. To take but one example, there has been considerable debate about the desirability of prohibiting public employee unions from striking, a step that the State of Michigan itself has taken, [MCL 423.202]. But although Michigan has not adopted the federal model of labor relations in every respect, it has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. As already stated, there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act. The only remaining constitutional inquiry evoked by the appellants' argument, therefore, is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not." (Footnotes omitted.) 431 US 229.

Shortly thereafter the Court said:

"The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights. Even those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned

with its policy implications agree that '[t]he union security issue in the public sector * * * is fundamentally the same issue * * * as in the private sector * * *. No special dimension results from the fact that a union represents public rather than private employees.' Wellington & Winter, The Unions and the Cities (1971), pp 95-96. We conclude that the Michigan Court of Appeals was correct in viewing this Court's decisions in *Hanson* and *Street* as controlling in the present case insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 US 232.

After the Court determined that the *Abood* record did not permit avoidance of the First Amendment issues raised, the following analysis and conclusion were stated:

"Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. *E.g., Elrod v Burns,* 427 US 347, 355-357 [96 S Ct 2673; 49 L Ed 2d 547 (1976)] (plurality opinion); *Cousins v Wigoda,* 419 US 477, 487 [95 S Ct 541; 42 L Ed 2d 595 (1975)]; *Kusper v Pontikes,* 414 US 51, 56-57 [94 S Ct 303; 38 L Ed 2d 260 (1973)]; *NAACP v Alabama ex rel Patterson,* 357 US 449, 460-461 [78 S Ct 1163; 2 L Ed 2d 1488 (1958)]. Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. *E.g., Elrod v Burns, supra,* at 357-360, and cases cited; *Perry v Sindermann,* 408 US 593 [92 S Ct 2694; 33 L Ed 2d 570 (1972)]; *Keyishian v Board of Regents,* 385 US 589 [87 S Ct 675; 17 L Ed 2d 629 (1967)]. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unre-

lated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

"One of the principles underlying the Court's decision in *Buckley v Valeo*, 424 US 1 [96 S Ct 612; 46 L Ed 2d 659 (1976)], was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals,' *id.*, at 22, the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interests,' *id.*, at 23.

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See *Elrod v Burns, supra*, at 356-357; *Stanley v Georgia*, 394 US 557, 565 [89 S Ct 1243; 22 L Ed 2d 541 (1969)]; *Cantwell v Connecticut*, 310 US 296, 303-304 [60 S Ct 900; 84 L Ed 1213; 128 ALR 1352 (1940)]. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd of Ed v Barnette*, 319 US 624, 642 [63 S Ct 1178; 87 L Ed 1628; 147 ALR 674 (1943)].

"These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso v Watkins*, 367 US 488 [81 S Ct 1680; 6 L Ed 2d 982 (1961)], or to associate with a political party, *Elrod v Burns, supra;* see 427 US, 363-364, fn 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may

oppose as a condition of holding a job as a public school teacher." (Footnotes omitted.) 431 US 233-235.

With reference to the issue framed by the United States Supreme Court, p 101, *supra*, *we* read *Abood* as holding: (1) that, as in *Hanson*, the State of Michigan's authorization of agency shop agreements in the public sector served a sufficiently compelling state interest in the achievement of labor stability to permit impingement on public employees' First Amendment rights to the extent of requiring payment of service fees for purposes germane to the collective bargaining duties of the teachers' union; and (2), that to the extent that agency fees were exacted and used for purposes beyond or apart from those activities related to collective bargaining, the plaintiffs had stated a claim upon which relief could be granted under the First Amendment.[20]

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[20] The Court drew no lines between the permissible and the impermissible, 431 US 236, and further clarified the context in which its decision was made:

"All that we decide is that the general allegations in the complaints, if proved, establish a cause of action under the First and Fourteenth Amendments." 431 US 237.

This language suggests that as to the compulsion of service fees for activities relating to collective bargaining, the complaints in *Abood* failed to state a claim upon which relief could be granted under the First and Fourteenth Amendments. As to the compulsion of service fees for other purposes, the plaintiffs' complaint did state a claim, and further proceedings going to the proof of that claim were required before a delineation of what activities were constitutionally permissible could be made. Established First Amendment principles indicate that, once an individual has stated a valid claim under the First Amendment, the burden of proof shifts to the state to show the infringement on individual rights that is claimed is unavoidable in order to accomplish a compelling state interest. See, *e.g.*, *Elrod v Burns*, 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

As previously stated, in the present case, this Court sits, under these unusual circumstances, as the trial court. Indeed, our order apointing a fact-finder for the purpose of conducting a hearing on the factual matters here involved necessarily implicitly recognized that Mr. Falk's pleading stated a claim in First Amendment terms which

With the foregoing understanding of *Abood* and its progenitors in mind, we now proceed to our analysis of the present case.

III. ANALYSIS

A. Controlling Principles

While the decision in *Abood* is of primary significance to the instant case, it does not offer a clear statement of the controlling framework for analysis of First Amendment issues of the kind here presented. We therefore turn to the earlier United States Supreme Court decision in *Elrod v Burns*, 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976), which does.

In *Elrod*, non-civil service employees of the Cook County, Illinois, Sheriff's Department challenged the constitutionality of the longstanding patronage system in that county. Under that system, employees were required to become affiliated with or sponsored by the political party in control of the office of Sheriff, or face the likelihood of being discharged.

Justice Brennan's lead opinion in the plurality decision neatly summarized the controlling First Amendment principles:

"Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. *Keyishian* and *Perry*, however, not only serve to establish a presumptive prohibition on infringement, but also serve to dispose of one suggested by petitioners' reference to this Court's affirmance by an equally di-

required development of an appropriate factual record. See 402 Mich 960 (1978).

vided court in *Bailey v Richardson*, 341 US 918 [71 S Ct 669; 95 L Ed 1352] (1951), *aff'g* 86 US App DC 248; 182 F2d 46 (1950). That is the notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. *Perry*, however, emphasized that '[f]or at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.' 408 US, at 597. *Perry* and *Keyishian* properly recognize one such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. ' "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." ' *Keyishian v Board of Regents*, 385 US, at 605-606. 'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' *Sherbert v Verner*, 374 US 398, 404 [83 S Ct 1790; 10 L Ed 2d 965] (1963). ' "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." ' *Sugarman v Dougall*, 413 US 634, 644 [93 S Ct 2842; 37 L Ed 2d 853 (1973)] (quoting *Graham v Richardson*, 403 US 365, 374 [91 S Ct 1848; 29 L Ed 2d 534 (1971)]).

"While the right-privilege distinction furnishes no ground on which to justify patronage, petitioners raise several other justifications requiring consideration. Before examining those justifications, however, it is necessary to have in mind the standards according to which their sufficiency is to be measured. It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v Valeo*, 424 US, at 64-65; *NAACP v Alabama [ex rel Patterson]*, 357 US [449, 460-461; 78 S Ct 1163; 2 L Ed 2d 1488 (1958)]. 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government ac-

tion, but indirectly as an unintended but inevitable result of the government's conduct. * * *' *Buckley v Valeo, supra,* at 65. Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper v Pontikes,* 414 US, at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Buckley v Valeo, supra,* at 94; *Williams v Rhodes,* 393 US [23, 31-33; 89 S Ct 5; 21 L Ed 2d 24 (1968)]; *NAACP v Button,* 371 US 415, 438, 444 [83 S Ct 328; 9 L Ed 2d 405 (1963)]; *Bates v Little Rock,* 361 US 516, 524 [80 S Ct 412; 4 L Ed 2d 480 (1960)]; *NAACP v Alabama [ex rel Patterson], supra,* 464-466; *Thomas v Collins,* 323 US 516, 530 [65 S Ct 315; 89 L Ed 430 (1945)]. In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. *Sherbert v Verner, supra,* [374 US] at 406. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, see *United Public Workers v Mitchell,* 330 US [75, 96; 67 S Ct 556; 91 L Ed 754 (1947)], and the government must 'employ] means closely drawn to avoid unnecessary abridgment. * * *' *Buckley v Valeo, supra,* at 25. '[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.' *Kusper v Pontikes, supra,* at 59 (citations omitted). See *United States v Robel,* 389 US 258 [88 S Ct 419; 19 L Ed 2d 508 (1967)]; *Shelton v Tucker,* 364 US 479 [81 S Ct 247; 5 L Ed 2d 231 (1960)]. In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss

of constitutionally protected rights." (Footnotes omitted.) *Elrod v Burns*, 427 US 360-363. See, also, *Abood v Detroit Board of Education*, 431 US 259-261 (Powell, J., concurring in judgment).

As the above quoted passage states, First Amendment protections are not absolute. The compelling interests of government may justify restrictions on the First Amendment freedoms of individuals.

It remains to be determined how, if at all, the arguments of the parties before us are to be resolved by application of the above-stated constitutional principles.

B. Arguments

The essence of Mr. Falk's First Amendment argument is that *Abood* mandates a ruling in this case that he cannot be compelled to pay dues which are used for non-regulatory activities of the State Bar, particularly lobbying and other political activities.

The State Bar responds that *Abood* is foremost a labor law case, and is not applicable in the present action. The State Bar is not a labor organization, but is rather a "public body corporate" that operates as a public or state agency. Further, the State Bar argues that the grant of permission to practice law is a privilege and not a right. The state may burden this privilege with conditions. Finally, the State Bar contends that assuming *arguendo* the applicability of *Abood* here, all that case requires is that dues be "imposed for purposes germane to the organization and existence of the State Bar", which includes those purposes stated in State Bar Rule 1.

As shall be hereinafter developed, we find the

plaintiff's arguments and authorities to be the more convincing.

C. Holding

Certainly *Abood* and the case before us can be distinguished. However, neutral analysis reveals that the factual differences in the two cases lead to the conclusion that the First Amendment principles announced and applied to the facts in *Abood* impact with even greater force upon the present case.

In *Abood*, the United States Supreme Court found certain attributes of an agency shop agreement, permissively authorized by state law, potentially violative of the objecting teachers' First Amendment rights. While all teachers must be state-certified in Michigan,[n] they are not required to join any state-controlled organization. Indeed, the teachers in *Abood* could have avoided the violation of their First Amendment rights by seeking employment with an unorganized Michigan school district, or with unorganized private or parochial Michigan schools. While the state had authorized school districts and teacher organizations to voluntarily enter agency shop contracts, the state has never required individual teachers to associate with and pay dues to a teacher's association as a condition of obtaining and maintaining certification as a teacher in Michigan.

On the other hand, we are here concerned with the propriety of state-compelled association in, and financial support of, a "public body corporate" as a condition precedent to the pursuit of one's liveli-

[n] See MCL 380.1531 *et seq.*; MSA 15.41531 *et seq.*; MCL 388.551, 388.553; MSA 15.1921, 15.1923.

hood as an attorney in this state, in any active legal capacity. No alternatives, even unpalatable ones, exist for the objecting individual attorney.

Mr. Falk's petition does not specify which of his First Amendment rights are offended. However, we are satisfied that his pleading raises issues involving his rights to freedom of association[23] and freedom of belief.[24] The State of Michigan's requirement of association with, and financial support of, the integrated State Bar clearly has a significant impact on these rights. See *Abood v Detroit Board of Education*, 431 US 222.

First Amendment guarantees are made applicable to the several states through the Due Process Clause of the Fourteenth Amendment. See *Gitlow v New York*, 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925); *De Jonge v Oregon*, 299 US 353, 364-365; 57 S Ct 255; 81 L Ed 278 (1937). It is well established that state action which infringes on First Amendment rights can only be tolerated where such infringement is unavoidably required in order to further a "compelling",[25] "para-

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[23] See *Abood v Detroit Board of Education*, fn 2 *supra*, 431 US 233; *Cousins v Wigoda*, 419 US 477, 487; 95 S Ct 541; 42 L Ed 2d 595 (1975); *Kusper v Pontikes*, 414 US 51, 56-57; 94 S Ct 303; 38 L Ed 2d 260 (1973).

[24] See *Abood v Detroit Board of Education*, fn 2 *supra*, 431 US 234-235; *Stanley v Georgia*, 394 US 557, 565; 89 S Ct 1243; 22 L Ed 2d 542 (1969); *Cantwell v Connecticut*, 310 US 296, 303-304; 60 S Ct 900; 84 L Ed 1213; 128 ALR 1352 (1940); *Wooley v Maynard*, 430 US 705, 714-715; 97 S Ct 1428; 51 L Ed 2d 752 (1977). See also *Elrod v Burns*, 427 US 347, 355-356; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

[25] See *Bates v Little Rock*, 361 US 516, 524; 80 S Ct 412; 4 L Ed 2d 480 (1960); *NAACP v Button*, 371 US 415, 438-439; 83 S Ct 328; 9 L Ed 2d 405 (1963); *Williams v Rhodes*, 393 US 23, 30-32; 89 S Ct 5; 21 L Ed 2d 24 (1968); *Storer v Brown*, 415 US 724, 729; 94 S Ct 1274; 39 L Ed 2d 714 (1974); *American Party of Texas v White*, 415 US 767, 780; 94 S Ct 1296; 39 L Ed 2d 744 (1974); *Wooley v Maynard*, 430 US 705, 715-716; 97 S Ct 1428; 51 L Ed 2d 752 (1977). See also *Ohralik v Ohio State Bar Ass'n*, 436 US 447, 462; 98 S Ct 1912; 56 L Ed 2d 444 (1978).

mount",[25] or "vital"[26] state interest. Unquestionably, the state has very strong, even compelling, interests in the regulation of, and maintenance of high standards in, the legal profession, "since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts' ". See *Ohralik v Ohio State Bar Ass'n*, 436 US 447, 460; 98 S Ct 1912; 56 L Ed 2d 417 (1978) (citation omitted). Nonetheless, and although the permission to practice law may rightly be regarded as a privilege, the state's intrusion on First Amendment rights of all individuals, including attorneys, must be consciously and scrupulously minimized.

We therefore conclude that, in light of the controlling First Amendment principles as hereinabove discussed, the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys. See *Abood v Detroit Board of Education, supra; Elrod v Burns, supra*, at 360-363 (Brennan, J., plurality opinion); see also cases cited in fns 24, 25 and 26.

IV. FINDINGS, CONCLUSIONS, AND RELIEF

Having considered the pleadings, the briefs, the oral arguments of the parties, the report of the

[25] See *Elrod v Burns*, 427 US 347, 362; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

[26] *American Party of Texas v White*, fn 24 *supra*, 415 US 780-781. See also *Elrod v Burns*, fn 25 *supra*, 427 US 360-363; *Buckley v Valeo*, 424 US 1, 93-94; 96 S Ct 612; 46 L Ed 2d 659 (1976).

fact-finder, and other relevant material and authorities, we make the following findings of fact and conclusions of law:[27]

1. That the original pleading in this action, entitled "Petition for Special Relief", is in the nature of a complaint for a writ of superintending control, and is within this Court's original jurisdiction pursuant to GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219

2. That plaintiff Allan Falk is, and has been, like all active attorneys in this state, required as a matter of law to be a member of the State Bar of Michigan and is, and has been, required to pay dues in support of that organization;

3. That Mr. Falk has been excused of the obligation to pay any dues to the State Bar of Michigan during the pendency of this action;

4. That the State Bar of Michigan engages in many activities which the plaintiff's dues have been, and would now be, used to support, and with which the plaintiff must associate by virtue of his compulsory membership in the State Bar;

5. That Mr. Falk's Petition for Special Relief and his briefs in support thereof express his objec-

[27] As previously indicated, fn 4 *supra*, no other member of the State Bar has sought to intervene in this case, although pendency of this action was reported in the Michigan State Bar Journal. See 57 Mich State Bar J 224-225 (March, 1978).

We realize that, to the extent that this decision has retroactive application, restitution of improperly used bar dues would be the appropriate equitable remedy. However, we are equally aware of the pertinence here of the maxim of equity that "equity aids the vigilant, not those who sleep on their rights". See *Zoellner v Zoellner*, 46 Mich 511, 515; 9 NW 831 (1881); *Douglass v Douglass*, 72 Mich 86, 98-99; 40 NW 177 (1888); *Henderson v Connolly's Estate*, 294 Mich 1, 18-20; 292 NW 543 (1940); *Gustin v Alpena Power Co*, 307 Mich 241, 244; 11 NW2d 873 (1943). We find this principle particularly forceful in the present circumstances, since the group of persons affected by this decision is composed of trained and qualified lawyers, presumably well-informed on such matters, and certainly on notice as to the pendency of this action.

tions, on First Amendment grounds and otherwise, to various activities of the State Bar of Michigan, and that such petition states a claim upon which relief can be granted under the First Amendment;

6. That the controlling United States Supreme Court decisions relevant to Mr. Falk's claim mandate that the State of Michigan, through its various branches of government and its agencies, cannot require association with, or payment of dues in support of, the State Bar of Michigan for other than those duties and functions of the State Bar which serve compelling state interests and which cannot be achieved by means less intrusive upon the First Amendment rights of objecting attorneys;

7. That under the controlling United States constitutional principles, once an individual has stated a claim upon which relief can be granted under the First Amendment, the burden is on the state or its agency to show the existence of a compelling interest which cannot be achieved with less intrusion upon the affected individual's First Amendment rights;

8. That the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are, in the context of the present challenge, purposes in which the State of Michigan has a compelling interest which will justify unavoidable intrusions on the First Amendment rights of objecting attorneys;

9. That the record in this case establishes that the defendant State Bar of Michigan has shown a compelling state interest in the following functions of the State Bar, and that such functions cannot be accomplished by means less intrusive on the First Amendment rights of an objecting attorney:

A. All regulatory activities, including attorney

disciplinary proceedings as provided in GCR 1963, 950 *et seq.*, to the extent that such activities are funded out of compulsorily exacted State Bar dues; all licensing-related activities such as those provided for in State Bar Rule 15;

B. All continuing legal education activities presently engaged in by the State Bar which are directed to the maintenance of high professional standards among Michigan attorneys;

C. The publication of the Michigan Bar Journal insofar as that publication is primarily devoted to informing the members of the State Bar on current matters relating to regulation of the profession and the improvement of professional standards;

D. The Client Security Fund insofar as it represents a discharge of a duty to protect the public from recreant members of the profession. The cost of this fund is properly distributed among all members of the profession regardless of individual predilections toward or opportunity for wrongdoing. Support of the Client Security Fund is but a logical and necessary extension of our admittedly imperfect regulatory and licensing standards and is a duty necessarily imposed on a profession committed to the public interest;

E. Those activities designed to educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally. This should not be read to include those outreach programs designed to educate the public concerning specific legislation or promoting specific viewpoints. Permissible activities in this area include the publication and distribution of such booklets as "You and the Law", and the "Juror's Manual";

F. Activities designed to make legal services

more accessible, including the Lawyer Referral Service and support for those legal aid organizations serving the indigent. These activities represent a part of the service every attorney owes the public and hence compelling support for them cannot be deemed constitutionally obnoxious.

10. That the political and legislative activities of the bar, which constitute a function wholly separable from its other activities, violate petitioner Falk's First Amendment rights of association and expression.

The record clearly discloses the extent of the State Bar's legislative and lobbying activities. These include but are not limited to: rendering technical advice to the Legislature; testifying before the State Officers Compensation Commission; adopting and publishing official positions on proposed legislation; and retaining a professional lobbyist. To the extent these efforts are funded by mandatory dues, the State Bar impermissibly infringes on the First Amendment freedoms of its individual members.

The ultimate objective of these political and legislative activities is to influence public decision-making. Even if specific legislative-political goals can be justified as advancing the public interest or improving the administration of justice, compelled support and association to further these activities is not constitutionally acceptable. The "public interest" and the "advancement of jurisprudence" are not unitary concepts subject to a single interpretation. Disagreements regarding legislative or other policy choices arise not only because they result in differing practical effects on individuals, but more importantly because they reflect differing ideological approaches to the subject matter. Such ideological beliefs, and association to promote or

oppose such beliefs, lie at "the core of those activities protected by the First Amendment". *Elrod v Burns*, *supra*, 356.

That Petitioner Falk is entitled to express his disagreement within the organizational framework does not wholly diminish the fact that he is being forced to associate for purposes contrary to his beliefs. The focus is not upon freedom of expression within the organization, but rather upon whether the state can justify the forced association in the first instance.

We do not believe that for First Amendment purposes a distinction can be drawn between legislation aimed at issues loosely termed procedural, such as court reorganization and rules of evidence in product liability actions and the like, and those termed substantive. In either category of legislation, the choice of one approach over another is necessarily premise-based and thus subject to contrary opinion or belief. Compelling a dissenter to finance the encouragement of such First Amendment related legislation and associate with its advancement, whether or not he or she opposes it, cannot be justified in the absence of an overriding state need and then only by means narrowly drawn.

In light of alternative methods available to the Legislature to obtain expert legal advice as to both "substantive" and "procedural" legislation, we see no compelling interest to justify the State Bar's legislative activities supported by compulsory dues. Specifically, the Legislature possesses subpoena power, MCL 4.101; MSA 2.181, and has access to the Legislative Service Bureau, the Attorney General, and House and Senate counsel, as well as committee counsel. Additionally, there are a number of voluntary and self-supporting sections

within the State Bar from whom the Legislature can seek input on legal questions. Further, while they cannot be compelled to do so, individual members may be given the opportunity and may choose to voluntarily support legislative and lobbying activities undertaken by the State Bar.

11. That similarly the broad category of State Bar activities designed to further the commercial and economic interests of the members cannot survive First Amendment scrutiny. Unlike the union members in *Abood*, attorneys cannot be categorized as a group with homogeneous economic interests. In fact, the economic interests of different attorneys often are in direct conflict. Such conflicts, and the requirement that members contribute to an association which may, therefore, undercut their self-interests, cannot be brushed aside as something that will be ameliorated by the "democratic process" within the bar. Further, and more important, furtherance of the commercial interests of attorneys, just as those of doctors or accountants, can hardly be found to constitute a compelling governmental interest. Since the end itself cannot be justified, the means designed to serve that end, such as the Lawyer Placement Service, must fall in the face of a First Amendment challenge.

12. That as to all other State Bar of Michigan activities, the present record fails to demonstrate a compelling state interest which cannot be served by means less intrusive on the First Amendment rights of an objecting individual attorney.

However, apart from those permissible activities discussed in paragraph 9, the State Bar's legislative and lobbying activities, and those activities solely designed to further the commercial interests of its membership, we acknowledge that determi-

nation of the state interest in the remainder of the challenged State Bar activities and whether that interest, if compelling, is served by narrowly drawn means is made difficult, indeed impossible, by a most inadequate record.

Consequently, we would order:

A. That the State Bar of Michigan be enjoined from disbursing compulsorily exacted dues for any functions or purposes other than those described in paragraphs 9A-9F effective as of October 1, 1981, the end of the State Bar of Michigan's fiscal year and that, in the interim, the bar poll its members to identify those willing to support such other activities on a voluntary basis and permit solicitation of contributions from those members for these purposes.

The bar would be permitted, in the interim, to present further facts to this Court, through a master, only as to those activities for which we have concluded the record is inadequate for the purpose of demonstrating an as yet unrevealed compelling interest unavoidably served by mandatory dues.

B. That the State Bar of Michigan determine the proportion of dues paid by each member which does not relate to the above-declared constitutional purposes and functions, and that the amount of dues as of and after October 1, 1981 be reduced accordingly.

C. That plaintiff Allan Falk be advised of the portion of his excused bar dues which relates to the purposes of the State Bar described in paragraphs 9A-9F, and that he pay to the State Bar that amount within 30 days after he is so notified.

FITZGERALD and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

WILLIAMS, J. The principal issue in this case is whether an "integrated" state bar with mandatory membership of all attorneys in the state can perform specified activities, financed in part by compulsory dues, without violating First Amendment rights of those dues paying member attorneys not in accord with such activities. The complained-of activities specified are the following: (1) lobbying and other political activity, (2) compulsory membership in Young Lawyers Section, (3) promoting prepaid legal services, (4) lawyer referral, (5) lawyer placement, (6) Client Security Fund, (7) public education about legal services, (8) funding of Lawyers Wives of Michigan and Children's Charter of Michigan activities, (9) giving and paying for social functions, including those where the Supreme Court Justices are guests of honor, (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court and other judicial salaries, and (11) sale of use of State Bar mailing roster.

After careful consideration of the authority delegated to the Michigan State Bar and the compelling state interest on the one hand, and the possible infringement of petitioner's First Amendment rights in the 11 specific instances on the other hand, this Court holds that there is no showing of an unconstitutional violation of petitioner's First Amendment rights with respect to the above items, excepting item 11 where we find an invasion of petitioner's right to privacy. We note there was no record reference to political activities, such as support of, or opposition to, partisan candidates and partisan issues, which would be offensive to both the State Bar Rules and the First Amendment.

I. FACTS

Petitioner is required by state law[1] and by court rule[2] to belong to and pay dues to the Michigan State Bar. It is petitioner's basic contention, culled from both his broad "Petition for Special Relief" and his tripartite pleadings (brief, reply brief and supplemental reply brief), that the use of his compulsory dues monies for the aforementioned State Bar sponsored activities occasions an unconstitutional infringement of his First Amendment rights

[1] 1935 PA 58. This act, in pertinent part, provided:

"AN ACT to create the state bar of Michigan; and to authorize the supreme court to provide for the organization, regulation and rules of government thereof.

"The People of the State of Michigan enact:

"Sec. 1. There is hereby created an association to be known as the state bar of Michigan, the membership of which shall consist of all persons in the state now or hereafter regularly licensed to practice law in this state.

"Sec. 2. The supreme court is hereby authorized to provide for the organization and regulation of the state bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein, * * * non-payment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members. * * *"

[2] Supreme Court Rules concerning the State Bar of Michigan provide in pertinent part:

"RULE 2. MEMBERSHIP.

"Those persons who are licensed to practice law in this State on December 2, 1935, and those who shall become licensed thereafter to practice law in this State, shall constitute the membership of the State Bar of Michigan subject to the provisions of these rules."

"RULE 4. MEMBERSHIP DUES.

"(a) An active member's dues for each fiscal year (October 1 through September 30), payable at the State Bar's principal office by October 1 of each year, are:

"(1) $150, for a member admitted to practice 3 years or more (counting the fiscal year in which admission took place as a full year), admitted from another jurisdiction, or admitted under Board of Law Examiners Rule 5(D);

"(2) $90, for a member admitted to practice less than 3 years. For the fiscal year of admission, dues are $90 if admitted between October 1 and March 31, and $45 if admitted between April 1 and September 30."

because those activities are not in furtherance of the "regulation" of the bar.[3] Petitioner would therefore have us rule[4] that the only State Bar activities which constitutionally "regulate" the profession and thus sanction the use of his dues monies therefor, are those which relate to "regulation and discipline of the profession, continuing legal education, and related licensing functions", as well as "associated administrative and other overhead expenses".

II. GENERAL BACKGROUND

Petitioner's complaint is based essentially on the following line of reasoning:

(1) Authority over the integrated state bar derives from 1935 PA 58;

(2) Authority over the integrated state bar is

[3] In addition to his Federal First Amendment arguments (freedom of association, freedom of speech, freedom of religion, and right to privacy), petitioner's brief also discusses possible violations of the Federal Commerce Clause, US Const, art I, § 8, cl 3, and Const 1963, art 4, § 24 (title-body clause); art 4, § 30 (assent of two-thirds of each house of the Legislature required for appropriating public money for private purposes); and art 3, § 2 (separation of powers principle).

[4] This case was commenced as an original proceeding in this Court on November 30, 1977 when the petitioner filed his "Petition for Special Relief", naming the State Bar of Michigan as defendant. Acting on this petition, this Court subsequently appointed former Judge Maurice E. Schoenberger to conduct hearings and make findings of fact on the issues petitioner raised. 402 Mich 960 (1978). These hearings were held on June 5 and 6, 1978. Both parties presented testimony and exhibits relating to the various activities and functions of the State Bar, and Judge Schoenberger concluded that there were no controverted factual matters which required resolution.

We agree with Justice RYAN'S treatment of this petition as a complaint for writ of superintending control over the State Bar, within our original jurisdiction, GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219, and with his interpretation of the petition for special relief as a request that we relieve petitioner of the obligation of paying the pro rata portion of his State Bar dues which relates to the complained-of activities, except insofar as petitioner requests in his brief that the State Bar be required to remove his name from its "commercial solicitation mailing list".

confined to "regulation" of the legal profession; "regulation" is limited to the "regulation and discipline of the profession, continuing legal education, and related licensing functions", as well as "associated administrative and other overhead expenses", which do not include the 11 specified activities to which petitioner objects;

(3) Petitioner's First Amendment rights are infringed when the integrated state bar pursues activities other than "regulation" because the petitioner's dues payments may then help finance activities to which petitioner may be ideologically opposed or from which petitioner derives no direct pecuniary benefit;

(4) *Abood v Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), supports petitioner's position.

As a consequence, this Court's inquiry necessarily must consider the following questions among others:

(1) Is the Supreme Court's authority over the integrated state bar derived exclusively from 1935 PA 58, or is it also derived from this Court's inherent power in the administration of justice?

(2) Is authority over the integrated state bar confined to "regulation" of the legal profession in the sense petitioner uses regulation or is the Supreme Court's power broader so as to cover some or all of the 11 specified activities pursued by the State Bar?

(3) What is the legal interplay between petitioner's asserted First Amendment rights and the state's compelling interest in this matter?

(4) What guidance is there for the present matter, where the state's compelling interest is in the improvement of the administration of justice and advancement in jurisprudence, from *Abood* where

the state's compelling interest was in labor peace through collective bargaining?

III. INHERENT POWER OF THE SUPREME COURT AND STATE BAR RULE 1

The keystone of petitioner's argument is his interpretation of the word "regulation" found in 1935 PA 58, the act which, in its own words, "created" the integrated State Bar in Michigan. According to petitioner, it is this "procreative engendering legislation" from which this Court derives its power to impose dues, and which limits the State Bar to "regulatory" purposes in expending dues monies.

In view of petitioner's assertions concerning both what he perceives to be the definitional perimeters of the word "regulation", and this Court's power respecting the legal profession of this state, we feel it would be advantageous, preliminary to our inquiry into petitioner's First Amendment claims, to examine the existent schema of legislative and judicial action regarding the integration of Michigan's Bar. In so doing we hope to shed some light on the proper scope of the State Bar's authority over the attorneys of this state, as well as set the stage for our consideration of the constitutional issues raised by petitioner.

The first action toward integration of the Michigan Bar was taken by the Legislature through enactment of 1935 PA 58. This act, by its terms, "created" an integrated State Bar in Michigan, *i.e.*, a bar organization in which membership and payment of dues is required as a condition of practicing law in the state.[4] This act also authorized this Court

[4] See fn 1, *supra*.

"to provide for the *organization and regulation* of the state bar of Michigan; to provide *rules and regulations concerning the conduct and activities of the association and its members;* the schedule of membership dues therein, * * * non-payment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members."[6] (Emphasis supplied.)

That same year this Court promulgated a set of rules for the organization of the State Bar, stating in § 16 of those rules that it did so "pursuant to the powers of the court over the bar of the State and the members thereof", 273 Mich xlv (1935). Section 1 of those rules outlined in broad terms the purposes of the State Bar.

"The association [State Bar of Michigan] shall, under these rules, aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this State." 273 Mich xxxv (1935).[7]

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[6] The present version of this section is MCL 600.904; MSA 27A.904. There have been several substantive changes in this section, none of which, however, affect our discussion. The present version reads as follows:

"The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar."

[7] Section 1 of the State Bar Rules has undergone little change since its promulgation in 1935. In its present form it states, in relevant part:

"The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state." State Bar Rule 1, 340 Mich xxxviii (1954).

At this point we must recognize that petitioner has expressly disclaimed any assertion that the challenged activities are in violation of the State Bar's "internal constitution" (which we take to mean § 1 of the Rules Concerning the State Bar of Michigan, hereinafter sometimes called State Bar Rule 1 or Rule 1) and, apparently, would not contest the right of the State Bar to engage in these activities on behalf of voluntary contributors.[8] Petitioner having chosen, instead, to base his challenge to the objected-to activities on the First Amendment, it becomes unnecessary for us to dissect each of those activities in order to interpret precisely what falls within and what without the bounds of Rule 1. We therefore, for purposes of this case, will assume that the State Bar has authority under the lawfully delegated power of Rule 1 to perform the acts herein complained of. Nevertheless, since none of the complained-of State Bar activities were expressly provided for by either the Legislature in 1935 PA 58, or subsequent amendments to that section, or the judiciary in its rules concerning the State Bar, petitioner's constitutional challenge requires us to determine if these activities are constitutionally legitimate activities of the State Bar under the broad purposes enunciated in Rule 1. Of course, before we can undertake our First Amendment scrutiny, we must determine whether State Bar Rule 1 and the interests it advances are valid. It is to this consideration that we now turn.

In order to determine the validity of State Bar Rule 1, we must, to some extent, consider the respective powers of the Legislature and this Court

[8] In passing, we observe that if petitioner in referring to political activities had in mind the support of and opposition to partisan candidates and partisan issues, Rule 1 certainly does not sanction such activity, as the State Bar has properly recognized.

over attorneys of this state. In so doing, however, it would serve no useful purpose toward the resolution of this issue to become enmeshed in an abstract discussion of the precise measure of respective control that the Legislature and this Court could constitutionally exercise in this regard. It is sufficient for the purposes of our present discussion to recognize that courts have traditionally sought to harmonize their legitimate concerns with those of the Legislature. Thus while on the one hand courts are willing to acknowledge that the Legislature has a legitimate interest in the members of the bar because of its concern on behalf of the public interest and welfare, see *e.g., Button v Day,* 204 Va 547, 554; 132 SE2d 292, 297 (1963); *Detroit Bar Ass'n v Union Guardian Trust Co,* 282 Mich 707, 712; 281 NW 432 (1938), quoting from *In re Cannon,* 206 Wis 374, 397; 240 NW 441 (1932), the courts have been emphatic in recognizing their own peculiar and special interest in the conduct of attorneys since, as officers of the court by virtue of the practice of their profession (see GCR 1963, 908; MCL 600.901; MSA 27A.901), attorneys are " 'indispensable to the administration of justice and [are] intimate and peculiar in [their] relation to, and vital to the well-being of, the court' ". *Sams v Olah,* 225 Ga 497, 504; 169 SE2d 790, 798 (1969). See also *Button, supra,* 553-554; *In re Petition for Integration of the Bar of Minnesota,* 216 Minn 195, 199; 12 NW2d 515, 518 (1943). Thus courts have recognized in themselves an inherent power to regulate the practice of law and to supervise those engaged therein to the extent necessary for their proper functioning and generally find legislative regulation unconstitutional only when it tends to interfere with or impair the proper administration of judicial functions. *Guardian Trust Co, supra,* 713; *Olah, supra,* 501-502.

Thus in passing on the present conjunction of legislative and judicial action relating to the integration of the State Bar in Michigan, this Court has tempered its willingness to accord legislative enactments the proper degree of deference due a co-equal branch of government with a persistent insistence on its own inherent powers.[9] In *Ayres v Hadaway*, 303 Mich 589, 597-598; 6 NW2d 905 (1942), this Court stressed its own inherent power over attorneys of this state, while at the same time upholding the constitutionality of 1935 PA 58 against the contention that it violated due process since the court rules concerning the State Bar provided that inactive members of the bar were prohibited from practicing law. After citing several foreign jurisdictions on the subject of the inherent power of a court to regulate attorneys, this Court stated:

"In our opinion there is inherent power in the Supreme Court to regulate the qualifications of persons who may be permitted to practice law in this state. That the legislature has seen fit to adopt legislation [1935 PA 58] to this end does not make the act unconstitutional."

This Court reiterated, in more detail, essentially the same position almost two decades later when it held the State Bar's property in Lansing to be tax exempt public property in *State Bar of Michigan v Lansing*, 361 Mich 185, 194; 105 NW2d 131 (1960):

"The provisions of this act [1935 PA 58] are such as to clearly indicate that it was the intent of the legisla-

[9] In Michigan this inherent power derives in part from article 6, § 5 of our 1963 Constitution which states that:

"The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." See *In re Schlossberg*, 388 Mich 389, 395; 200 NW2d 219 (1972).

ture to provide for the organization of an agency that should function pursuant to rules and regulations prescribed by the Supreme Court for the purpose of performing, and assisting in the performance of *functions that, in the final analysis, pertain to the judiciary.* Clearly if such was not in the intention there would have been no attempt to invest this Court with the powers of organization and regulations obviously contemplated by the language of the statute.

• • •

"These are matters [matters pertaining to the discipline, suspension, or disbarment of members of the profession and the fixing of ethical standards to be observed in the practice of law] that relate to the public welfare and protection. *Likewise, they are matters within the scope of the inherent power of the judiciary."* (Emphasis supplied.)

Because there has been legislative action on the subject, there is no necessity for this Court to now assert inherent power to integrate the Bar independent of or contrary to legislative action.[10] See *Button v Day, supra,* 554.

As to whether State Bar Rule 1—with its broad injunction to "aid in promoting improvements in the administration of justice" etc. (as opposed to petitioner's narrowly construed "regulation")—is valid or not, we rule in the affirmative for two reasons. First, we believe that State Bar Rule 1 is consistent with the legislative purpose, expressed in 1935 PA 58, that this Court provide for the "regulation" of the State Bar and adopt "rules and regulations concerning the conduct and activities

[10] State Supreme Courts that have directly confronted the question of their inherent power to integrate their State Bars have, to the best of our knowledge, unanimously held themselves to possess such power. See, *e.g., Wallace v Wallace,* 225 Ga 102, 109-110; 166 SE2d 718, 723 (1969); *In the Matter of Integration of the Bar of Hawaii,* 50 Hawaii 107, 109; 432 P2d 887, 888 (1967); *In re Unification of the New Hampshire Bar,* 109 NH 260, 264; 248 A2d 709, 712 (1968).

of the association and its members". This Court stated as much in *Lansing, supra,* 194:

> "The rules and regulations that have been adopted are consistent with the legislative purposes, as disclosed by the act [1935 PA 58]."

Indeed, we know of no rule of statutory construction which would counsel this Court to interpret "regulation" in the narrow and confining sense petitioner advocates (remembering that we are not at this point addressing any constitutional implications of State Bar Rule 1). To provide the flexibility necessary to help this Court insure that the State Bar can achieve such worthy results as, to quote one state supreme court, " 'restor[ing] public confidence in the bar, enlarg[ing] professional consciousness, energiz[ing] the bar's responsibility to the public, * * * improv[ing] the administration of justice and [being] the only means presented whereby every member of the bar can share in its public and professional responsibility' ", *In re Unification of the New Hampshire Bar,* 109 NH 260, 267; 248 A2d 709, 714 (1968), quoting from *Petition of Florida State Bar Ass'n,* 40 So 2d 902, 909 (Fla, 1949), we believe the Legislature intended "regulation" to be defined expansively. *Cf.* the broad reading given the word "regulate" found in the Commerce Clause of the Federal Constitution, US Const, art I, § 8, cl 3. See *Virginia R Co v System Federation No 40,* 84 F2d 641, 650-651 (CA 4, 1936); *Chicago, M. SP & P R Co v Public Service Comm,* 332 Mich 291, 296; 50 NW2d 884 (1952).

Second, and independent of the above construction of the word "regulation", we do not doubt that this Court possessed the inherent power to include in its rules and regulations for the integra-

tion of the Bar the provisions of State Bar Rule 1. In fact, the provisions of State Bar Rule 1 represent a garden variety statement of the legitimate purposes of an integrated bar which other state supreme courts have either considered when making the decision to judicially integrate a bar, see *In re Unification of the New Hampshire Bar*, supra, 263-264, or which the courts themselves have adopted through the exercise of their inherent powers. See *Button*, supra, 555; *Application of the President of the Montana Bar Ass'n*, 163 Mont 523, 526-527; 518 P2d 32, 34 (1974); *Lathrop v Donohue*, 367 US 820, 828-829; 81 S Ct 1826; 6 L Ed 2d 1191 (1961).

IV. Constitutional Challenges

Having examined the authority and scope of the State Bar Rules, we now turn to petitioner's constitutional challenges. Petitioner maintains that his First Amendment rights are being violated by the State Bar's expenditure of mandatory dues for activities unrelated to the licensing, education and regulation of the legal profession. Although conceding that the state may require attorneys to belong to an integrated bar association, petitioner argues that the State Bar may not constitutionally expend funds on activities which "may [support] positions inconsistent with mine".

In order to analyze the constitutional validity of petitioner's claim, we must determine:

a) whether First Amendment rights are absolute;

b) what type of state interest justifies intrusion on First Amendment rights;

c) what means may the state employ to promote the permissible state interest;

d) does Bar Rule 1 embody a permissible state interest; and

e) are the 11 complained-of State Bar activities permissible means to promote the permissible state interest.

We find that the First Amendment is not absolute but will give way to certain state activities which are germane to a compelling state interest. The state has a compelling interest in promoting improvements in the administration of justice and advancing the science of jurisprudence in order to fulfill its function of protecting the health, safety and welfare of its citizens. The state may employ activities which are germane to this compelling state interest. We find that insofar as State Bar Rule 1 authorizes the Bar to "aid in promoting improvements in the administration of justice and advancements in jurisprudence" it embodies a permissible state interest. After carefully reviewing petitioner's 11 challenges, we also find that all but the last activity, regarding the use of the State Bar mailing list for commercial solicitations, are germane to the state's compelling interest.

A. Are First Amendment Rights Absolute?

The First Amendment states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Supreme Court has long recognized that "[f]reedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment". *De*

Jonge v Oregon, 299 US 353, 364; 57 S Ct 255; 81 L Ed 278 (1937). See *Near v Minnesota ex rel Olson*, 283 US 697, 707; 51 S Ct 625; 75 L Ed 1357 (1931); *Gitlow v New York*, 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925). In contrast to the rights of freedom of religion, speech, press, and assembly, the right to freedom of association is not expressly listed in the First Amendment. Nevertheless, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment". *NAACP v Alabama ex rel Patterson*, 357 US 449, 460; 78 S Ct 1163; 2 L Ed 2d 1488 (1958). It is thus clear that freedom of speech and of association are both protected under the First and Fourteenth Amendments.

However, the rights to free speech and association are not absolute. In *Konigsberg v State Bar of California*, 366 US 36, 49; 81 S Ct 997; 6 L Ed 2d 105 (1961), the Court "reject[ed] the view that freedom of speech and association • • • are 'absolutes' " and held that the denial of petitioner's application to the California Bar for failure to answer any questions pertaining to his membership in the Communist Party did not violate the First Amendment.[11] The Court reaffirmed this concept 12 years later in *United States Civil Service Comm v National Ass'n of Letter Carriers, AFL-CIO*, 413 US 548, 567; 93 S Ct 2880; 37 L Ed 2d 796 (1973). In upholding the prohibition of federal employees from taking an active part in political

[11] Justice Harlan pointed out: "the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like" cannot be logically reconciled with the absolutist position. *Konigsberg*, *supra*, 49, fn 10. Even Justice Douglas conceded that the right to associate is not absolute. *Lathrop v Donohue*, 367 US 820, 882; 81 S Ct 1826; 6 L Ed 2d 1191 (1961) (dissent).

management or in political campaigns in accordance with § 9 of the Hatch act, 5 USC 7324(a)(2), Justice White acknowledged: "[n]either the right to associate nor the right to participate in political activities is absolute". That there are limits to the First Amendment's protection was recognized in *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976), where the Court declared that "[e]ven a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest".[12] Thus it is clear that the rights of freedom of speech and association, while fundamental to our Constitution and society, are not absolute.

B. What Type of State Interest Justifies First Amendment Intrusion

Although the First Amendment is not absolute the state must demonstrate a particular type of interest to justify constitutional intrusions. The question which we must resolve is what type of state interest is necessary.

"To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." *United States v O'Brien*, 391 US 367, 376-377; 88 S Ct 1673; 20 L Ed 2d 672 (1968).

For example, in affirming an order that injunctive relief be given to state government employees threatened with being discharged solely because

[12] *Buckley v Valeo*, 424 US 1, 25; 96 S Ct 612; 46 L Ed 2d 659 (1976) (upholding the limitation on, and reporting of, political contributions by the Federal Election Campaign Act of 1971, 2 USC 431 *et seq.*, but finding the limitation of independent and candidate expenditures violative of the First Amendment).

they were not affiliated with or sponsored by the Democratic Party, the Supreme Court held:

"It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v Valeo*, 424 US, at 64-65; *NAACP v Alabama*, 357 US 449, 460-461 (1958). * * * Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper v Pontikes*, [414 US 51, 58; 94 S Ct 303; 38 L Ed 2d 260 (1973)]. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v Burns*, 427 US 347, 362; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality).

Similarly when analyzing whether Illinois' state interest in protecting the effective right to participate in political primaries justified a state court injunction prohibiting a group of party members from acting as convention delegates the Supreme Court held:

"Even though *legitimate*, the '"subordinating interest of the State must be *compelling*" * * *' to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association. *NAACP v Alabama*, 357 US 449, 463 (1958)." *Cousins v Wigoda*, 419 US 477, 489; 95 S Ct 541; 42 L Ed 2d 595 (1975).

Thus the First Amendment must yield to state intrusion when there is a compelling state interest present.

C. The Means Employed to Promote the Permissible State Interest

Having found that the state must show a compelling interest to justify First Amendment intrusion we must look to the appropriate *means* which the state may employ to achieve its compelling

interest. Where the intrusive limitation on association *directly* affects the First Amendment right of expression (here political expression), as where a statute precludes voting in one party's primary within 23 months after voting in another party's primary, *Kusper v Pontikes*, 414 US 51, 58-59; 94 S Ct 303; 38 L Ed 2d 260 (1973), or where not belonging to a particular political party results in discharge from a government job, *Elrod v Burns*, 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality), the Court has adopted the strict, "least intrusive means" test.[13] In contrast, where the intrusive limitation on association *indirectly* affects the First Amendment right of expression, as where employees, though free to express their own views without limitation, are required to belong, and pay dues, to a union which may hold views different from the employees, *Abood v Detroit Board of Education*, 431 US 209, 225-226; 97 S Ct 1782; 52 L Ed 2d 261 (1977), the Supreme Court has applied the less restrictive "germane" test.[14]

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[13] For example, holding that the Illinois Election Code violated the First Amendment by prohibiting a person from voting in a primary election of a political party if that person had voted in another party's primary within the previous 23 months, Justice Stewart described when and how the least intrusive means test applies:

"[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. * * * For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. * * * If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper*, *supra*, 58-59.

[14] See also *Lathrop v Donohue*, 367 US 820, 843; 81 S Ct 1826; 6 L Ed 2d 1191 (1961), where the Supreme Court held:

"Both in purport and in practice the bulk of [the Wisconsin] State Bar activities serve the function * * * of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of

The most recent case in which the Supreme Court has taken a constitutional stand on the right of association is *Abood*. The Court upheld against First Amendment attack MCL 423.211; MSA 17.455(11) authorizing the use of agency shop clauses in collective bargaining agreements covering government employees, *Abood, supra,* 222, but overturned the use of mandatory dues for political purposes and for advancing ideological causes unrelated to collective bargaining. *Abood, supra,* 235-236. We note that the Court did not use the strict "least intrusive means" test in analyzing Abood's associational rights in either instance. Rather, the Court used the "germane" test and found that the Michigan Legislature had an "important governmental interest" in avoiding confusion which could arise from conflicting demands of rival teacher's unions; promoting labor peace; and preventing "free riders" from obtaining labor contract benefits without supporting bargaining expenses. *Abood, supra,* 224-225. The Court similarly found that the

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Wisconsin, in order to further the State's *legitimate interests* in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, *we are unable to find any impingement upon protected rights of association.*" (Emphasis supplied.)

The plurality of four was unwilling to decide whether Lathrop's "rights of free speech are infringed if his dues money is used to support the political activities of the State Bar" because they felt the record was insufficiently developed. *Lathrop, supra,* 844-845. However, three justices would have found that none of the Wisconsin Bar's activities violated any of Lathrop's constitutional rights. *Lathrop, supra,* 848 (opinion of Harlan, J., Frankfurter, J., concurring); 865 (opinion of Whittaker, J., concurring in result). The other two justices who addressed the freedom of speech issue, would have prohibited Wisconsin Bar from using mandatory dues revenue to advocate positions which any of its members opposed. *Lathrop, supra,* 865 (opinion of Black, J.); 877 (opinion of Douglas, J.).

expenditure of *mandatory union dues* "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes *not germane* to its duties as collective bargaining representative" violated the First Amendment right of union members who do not support such views, candidates of ideologies. Thus the Court's test in *Abood* was whether the expenditures were "germane to [the union's] duties as collective-bargaining representative".[15] Therefore we believe that the appropriate test to analyze petitioner's constitutional challenges is whether the state has a compelling interest involved, and if so, whether the Bar's complained-of activities are germane to that interest.[16]

D. Does Rule 1 Embody a Compelling State Interest?

The underlying question we must now address is whether "promoting improvements in the administration of justice and advancements in jurisprudence" is a compelling state interest? We find that it is. The United States Supreme Court implicitly recognized the state's compelling interest in promoting improvements in the administration of justice and advancements in jurisprudence in *Lathrop, supra,* 843, where Justice Brennan wrote:

"We think that the Supreme Court of Wisconsin, in order to further the State's *legitimate interests* in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the law-

[15] *Abood, supra.*

[16] We have, of course, decided upon the rationale of germaneness to a compelling state interest. However, we believe that an integrated state bar would be the least intrusive means to effectuate the compelling state interest. See *Application of the President of the Montana Bar Ass'n,* 163 Mont 523, 526; 518 P2d 32, 33 (1974).

yers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." (Emphasis supplied.)

In *Goldfarb v Virginia State Bar,* 421 US 773, 792-793; 95 S Ct 2004; 44 L Ed 2d 572 (1975), the Court explicitly recognized this legitimate state interest to be compelling:

"We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. * * * *The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'* See *Sperry v Florida ex rel Florida Bar,* 373 US 379, 383 [83 S Ct 1322; 10 L Ed 2d 428] (1963); *Cohen v Hurley,* 366 US 117, 123-124 [81 S Ct 954; 6 L Ed 2d 156] (1961); *Law Students Research Council v Wadmond,* 401 US 154, 157 [91 S Ct 720; 27 L Ed 2d 749] (1971)." (Emphasis supplied.)

The fair and efficient use of the state legal system is paramount to the state's very existence. Without a legal system to make, interpret and enforce laws, without some mechanism to weigh and resolve conflicting claims, there is anarchy.

As officers of the court, lawyers play an indispensable role in the administration of justice. The state must not only protect its legal machinery from abuse through such safeguards as the attor-

ney grievance procedure but must also be mindful of the competence of attorneys, who are in a position to best assist, or most impede, the general public in securing justice. Authorizing the State Bar to aid the state in promoting improvements in the administration of justice is essential for the state's continued existence. Therefore we find that the state has a compelling interest in instructing that "[t]he state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence". We do not separately consider whether the state's interest "in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in the State", State Bar Rule 1, are compelling.

With this determination in mind we now will examine petitioner's individual challenges to determine if the Bar activities are germane to the state's compelling interest.

E. Are the Bar Actions in the 11 Points Germane?

Petitioner attacks the following State Bar activities as violating his constitutional rights: (1) engaging in legislative and judicial lobbying and participating in other political activities (presumably supporting political candidates or state referendums); (2) requiring compulsory membership in the Young Lawyers Section; (3) promoting prepaid legal services; (4) supporting lawyer referral services; (5) aiding in lawyer placement; (6) maintaining a Client Security Fund; (7) promoting legal services and educating the public through pamphlets, magazines, radio and television advertisements of the availability and need of legal services; (8) funding Lawyers Wives of Michigan and Children's Charter of Michigan; (9) giving and paying for social functions, including receptions where the Supreme Court Justices are guests of

honor; (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court, and other judicial, salaries; and (11) selling the use of the State Bar mailing roster to commercial interests. He bases the majority of his claims on the First Amendment right to freedom of association, with an occasional reference to the First Amendment's freedom of speech, religion and privacy;[17] the Commerce Clause;[18] and various

[17] Nowhere in either his complaint or brief does petitioner specifically allege a violation of his right to freedom of speech. However, since petitioner claims that the use of Bar dues for non-"regulation" purposes constitutes "a violation of [petitioner's] First Amendment rights" and places strong reliance on *Abood, supra*, we will analyze petitioner's charges in light of both his right of freedom of association and freedom of speech.

Petitioner argues that certain State Bar expenditures violate the First Amendment's prohibition on the establishment of religion:

"The use of State Bar dues monies to purchase alcoholic beverages, pork and shellfish for consumption at social functions, particularly when not all State Bar members are invited to such functions or offered alternatives of equal value for dues paid, and which are unnecessary to the accomplishment of any goal central to the viability of the State Bar as a regulatory body, violates the rights of petitioner and other State Bar members under the free exercise and establishment of religion clauses of the First Amendment."

Petitioner has failed to show any instance when *only* these objectionable foods and beverages were served. If a person attends a cocktail party, luncheon, or dinner, he or she may select nonobjectionable food and beverage to consume. For example, cocktail parties have nonalcoholic drinks, such as sodas, gingerale, fruit juices, tonic water, etc., in order to serve mixed drinks. Luncheons and dinners rarely serve only pork and shellfish. Even a vegetarian, whether for religious or health purposes, can find sufficient quantities of vegetables, cereals, baked goods and other nonmeat foods to form a nutritious meal. Petitioner, therefore, cannot complain that he is being forced to either consume objectionable victuals or go hungry. Nor may petitioner impose his religious views on proper consumption on others. Simply put, petitioner has the right to attend general Bar functions and choose from a reasonable selection of foods and beverages that which he finds satisfactory to consume. He does not, however, have the right to limit other Bar members to his self-imposed diet. By providing a reasonable selection of foods and beverages to its members the Bar cannot be accused of establishing or promoting any religion.

Petitioner's right to privacy argument is treated in section IV, E(11), *infra*.

[18] US Const, art I, § 8, cl 3. Petitioner argues that "[t]he Due

provisions of the Michigan Constitution.[19]

(1) Lobbying and Other Political Activity

The major complaint of petitioner is that the State Bar annually expends in violation of his First Amendment rights large sums of money for two related programs: (1) "for the purpose of influencing the legislation pending before the Michigan Legislature" and (2) "to fund study projects by its constituent committees which result in recommen-

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Process Clause of the Fourteenth Amendment in conjunction with the Commerce Clause requires that fees which affect interstate commerce must not be 'excessive in comparison with the governmental benefits conferred.' *Evansville-Vanderburgh Airport Authority Dist v Delta Airlines, Inc*, 405 US 707, 717; 92 S Ct 1349; 31 L Ed 2d 620 (1972) * * *. Moreover, the imposition of economic burdens on activities in interstate commerce must be 'reasonable and fixed according to some uniform, fair and practical standard'. *Hendrick v Maryland*, 235 US 610; 35 S Ct 140; 59 L Ed 385 (1915)".

We recognize that the practice of law may be subject to the Commerce Clause in certain instances, see *Goldfarb v Virginia State Bar*, 421 US 773, 785; 95 S Ct 2004; 44 L Ed 2d 572 (1975) (minimum fee schedules published by county bar association and enforced by state bar violated § 1 of the Sherman act, 15 USC 1). However, petitioner has failed to show how the expenditure of State Bar mandatory dues for the promotion of the administration of justice is either excessive or a burden on interstate commerce. Therefore we find petitioner's claim to be spurious.

[19] Petitioner claims that 1) "[t]he use of State Bar dues monies for 'public' purposes not germane to its regulatory functions [as narrowly defined by petitioner] violates the title-body clause, Const 1963, art 4, § 24" [Petitioner's Brief, p 8]; 2) that such use "is illegal as * * * not having been authorized pursuant to the procedure required by Const 1963, art 4, § 30" to expend public money for a private purpose; and 3) that "[t]he Supreme Court lacks the power to authorize use of State Bar dues for non-regulatory purposes. * * * [T]o purport to authorize expenditures for additional purposes * * * would run afoul of the separation of powers principle ensconced in Const 1963, art 3, § 2".

Having recognized that this Court has the inherent power to regulate the legal profession in addition to any legislative authorization and having further found promulgation of State Bar Rules to be a valid exercise of that power, we reject petitioner's assertions as to the title-body clause, find that the Bar expenditures are for a public purpose, and rule that there is no violation of the separation of powers clause.

dations of policies to be adopted publicly by officials and agencies of the State of Michigan through executive or legislative or administrative action". Expenditures for the various committees reviewing the Michigan Land Title Standards and Criminal Code and Criminal Procedure Code, for the committee considering this Court's proposed Rules of Evidence, and to support the Bar's prison paralegal project are cited by petitioner as examples of improper use of Bar dues monies. There is nothing on the record to indicate Bar participation in partisan politics. But see fn 8.

Petitioner maintains that the Bar may only disburse its funds for "regulation" purposes. As aforementioned, part I, *supra*, petitioner limits "regulation" to "bar grievance activities, the expenses of the character and conduct committee, and subsidies paid to the Institute for *[sic:* of] Continuing Legal Education (ICLE), plus associated administrative and other overhead expenses". Petitioner argues that any other expenditure of mandatory Bar dues monies violates the First Amendment's right to freedom of association since membership in the Michigan State Bar Association is a prerequisite to the practice of law in this state.

Petitioner supports his position by claiming: "*Abood* controls the instant case and mandates a ruling in petitioner's favor." His argument is: "Conceptually, the State Bar of Michigan is a union shop.[9] This fact was implicitly recognized in *Abood*". He then states: "The specific holding in

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[9] "Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood*, *supra*, 217, fn 10. See 43 Words and Phrases, Union Shop, p 494.

Abood is that the employees of an agency shop[21] who object to the use of agency shop fees for political activity are entitled to a pro rata reduction in their fee assessment equal to the proportion *ideological expenditures* bear to the total union budget" (emphasis supplied).

The exact words of the Court in *Abood*, in pertinent part, follow:

> "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward *the advancement of other ideological causes not germane to its duties as collective-bargaining representative*. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." (Emphasis supplied.) *Abood, supra*, 235-236. (Footnotes omitted.)

The significant language in the quotation from the Court's opinion is in italics, because it indicates the difference between what the Court held and what petitioner asserts. The Court proscribed expenditures of dues money for *"the advancement of other ideological causes not germane to its duties as collective-bargaining representative"*, whereas petitioner speaks of *"ideological expenditures"* without any limitation. The difference, of course, is whether the ideological expenditure was or was not "germane" to the state's compelling interest.

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[21] An agency shop is an "arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues". *Abood, supra*, 211. See 2A Words and Phrases (1978-1979 Supp), Agency Shop, pp 73-74.

The significance of this distinction is emphasized by a quotation from the *Abood* Court as follows:

"An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. * * * To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But * * * such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood, supra,* 222.

It is obvious from our analysis thus far that all ideological expenditures are not necessarily in derogation of compulsory membership First Amendment rights and that the Court's critical test is whether the ideological expenditure is or is not "germane" to the state interest. This leaves the ultimate inquiries first, what is the compelling state interest, and second, whether the ideological expenditure is "germane" to that interest.

We have already considered and developed the state's interest in the administration of justice and in the advancement of jurisprudence. As a consequence we have a clear concept of what the state's compelling interest is in this case.

Our next inquiry therefore is whether or not the complained-of action here is "germane" to the administration of justice and the advancement of jurisprudence. "Lawyers, as members of an ancient and honorable profession, have a duty to utilize their training and experience in rendering

service to the public."[22] The state has a valid interest in drawing upon this training and experience in order to promote improvements in the administration of justice and to advance jurisprudence.[23] The better attuned the legal machinery is to the public's needs of health, safety and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems.[24] The State Bar's 44 standing committees and 12 special committees ensure that the collective experience of legal ex-

[22] *In the Matter of the Florida Bar Board of Governors' Action on Adoption of Proposed New State Constitution*, 217 So 2d 323, 324 (Fla, 1969). See Roscoe Pound, The Lawyer from Antiquity to Modern Man (St Paul: West Pub, 1953).

[23] Justice Harlan noted how important input from the legal profession is to the legislative and judicial branches:

" '[T]he composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law' *[Lathrop v Donohue*, 10 Wis 2d 230, 239-240; 102 NW2d 404 (1960)] may well be as helpful and informative to a state legislature as the work of individual legal scholars and of such organizations as the American Law Institute, for example, is to state and federal courts. * * * The function such groups serve is a rationalizing one and their power flows from and is limited to their ability to convince by arguments from generally agreed upon premises. They are exercising the techniques and knowledge which lawyers are trained to possess in the task of solving problems with which the legal profession is most familiar. The numberless judicial citations to their work is proof enough of their own usefulness in the judicial decision-making process.

"Legislatures too have found that they can benefit from a legal 'expert's effort to improve the law in technical and noncontroversial areas.' *Dulles v Johnson*, 273 F2d 362, 367 [CA 2, 1959]. In the words of the Executive Secretary of the New York Law Revision Commission, there are areas in which 'lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups.' [MacDonald, *Foreword to the Symposium,]* 40 Cornell L Q 641, 644 [1955]. See also Cardozo, *A Ministry of Justice*, 35 Harv L Rev 113 [1921]." *Lathrop, supra*, 863 (Harlan, J., concurring).

[24] "The office of attorney is indispensible to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court." 7 CJS, Attorney and Client, § 4, p 802, quoted with approval in *Sams v Olah*, 225 Ga 497, 504; 169 SE2d 790, 798 (1969).

perts in many fields will be voiced in the legislative and judicial process to promote improvements in the administration of justice and the advancement of jurisprudence.[35] In this manner the Legislature and Court can better arrive at a fair, effective and efficient result. Thus the state's need in receiving input and feedback from the Bar on appropriate proposed legislation and court rules is germane to its compelling interest in promoting improvements in the administration of justice and the advancement of jurisprudence.

Without more we hold that the State Bar's use of money, including some of petitioner's, to influence legislation and to fund committee study projects looking to that result is "germane" to the state's legitimate and compelling interest in the administration of justice and the advancement of jurisprudence with the result that such activity survives First Amendment attack and that there is nothing in *Abood* to the contrary.

In passing, however, some comment might be in order on petitioner's misunderstanding of *Abood*. *Abood*, like its predecessors,[36] involved a labor

[35] For example the Revision of Criminal Procedure Special Committee helps draft and critique "proposed codification of all laws and court rules pertaining to criminal procedure". Bylaws of the State Bar of Michigan, art V, 59 Michigan Bar J 49r, 54r (April, 1980). See also the Special Committees on the Criminal Code Revision and the Standard Criminal Jury Instructions and the Standing Committees on Civil Procedure and Legislation. *Id.*, 52r-54r. By obtaining input from members of both plaintiffs' and defendants' bar this Court has had a strong foundation upon which to build a comprehensive judicial system. However, any expenditures toward objectives other than the administration of justice or the advancement of jurisprudence, such as promotion of sports or arts, would be offensive both to Rule 1 and petitioner's First Amendment rights.

[36] See *Brotherhood of Railway & Steamship Clerks v Allen*, 373 US 113; 83 S Ct 1158; 10 L Ed 2d 235 (1963) (manifestation of opposition to any political expenditure of union shop dues is sufficient to state a cause of action); *International Ass'n of Machinists v Street*, 367 US 740, 768; 81 S Ct 1784; 6 L Ed 2d 1141 (1961) (Railway Labor Act, 45 USC 152[11], held to permit compulsory union dues only for collective

union. The case at bar, like *Lathrop v Donohue*,[22]

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bargaining purposes and not for partisan political purposes); *Railway Employes' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956) (Railway Labor Act, *supra*, upheld against First and Fifth Amendment challenges).

[22] 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961) (Wisconsin integrated Bar is not unconsistutional insofar as it merely requires lawyers practicing within the state to become members and pay reasonable annual dues). We reject petitioner's claim that *Abood* essentially overruled *Lathrop*. Justice Stewart, writing for the majority, noted that the Court could not avoid making a ruling in *Abood* on the constitutionality of using mandatory union dues for political and ideological purposes as they had in *Street*. He then footnoted the following observation:

"In *Lathrop v Donohue*, 367 US 820, a companion case to *[International Ass'n of Machinists v] Street* [367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961)], a lawyer sued for the refund of dues paid (under protest) to the integrated Wisconsin State Bar. The dues were required as a condition of practicing law in Wisconsin. The plaintiff contended that the requirement violated his constitutionally protected freedom of association because the dues were used by the State Bar to formulate and to support legislative proposals concerning the legal profession to which the plaintiff objected.

"A plurality of four Justices found that the requirement was not on its face unconstitutional, relying on the analogy to *[Railway Employes' Dep't v] Hanson* [351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956)]. And the plurality ruled, as had the Court in *Hanson*, that the constitutional questions tendered were not ripe, for the Court was nowhere 'clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities.' 367 US, at 845-846. The other five Members of the court disagreed with the plurality and thought that the constitutional questions ought to be reached. Three Justices would have upheld the constitutionality of using compulsory dues to finance the State Bar's legislative activities even where opposed by dissenting members. See *id.*, at 848 (Harlan, J., concurring in judgment); *id.*, at 865 (Whittaker, J., concurring in result). The other two Justices would have held such activities to be unconstitutional. See *ibid.* (Black, J., dissenting); *id.*, at 877 (Douglas, J., dissenting).

"The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, *due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, Lathrop does not provide a clear holding to guide us in adjudicating the constitutional questions here presented." Abood v Detroit Board of Education*, 431 US 209, 233, fn 29; 97 S Ct 1782; 52 L Ed 2d 261 (1977) (emphasis added).

Thus the Supreme Court did not overrule *Lathrop* but merely noted in passing that the plurality opinion was not based on constitutional

deals with an integrated bar association.

While there are superficial similarities between an integrated state bar and a labor union, that is not the question. The question is whether the compelling state interest justifying intrusion on First Amendment rights is the same in both cases. The answer is an emphatic negative. In *Abood* the compelling state interest is achieving labor peace through collective bargaining. In an integrated bar the compelling state interest is the administration of justice. Obviously what might be germane to collective bargaining could be quite different from what is germane to the administration of justice. A labor union, for example, would at the most have indirect interest in improvement of court rules, whereas an integrated state bar could have intense interest in such rules.

Further, we note that petitioner in his original brief does not maintain that he holds political or ideological views contrary to those of the State Bar. Petitioner broadens his argument somewhat in his Reply Brief, p 40, when he states: "Public interest is not a unitary concept * * *; the State Bar officers have their view and plaintiff has his. Plaintiff cannot be required to underwrite the expense of the former in promulgating their views". However, petitioner failed to specify even one conflicting view but noted instead: "plaintiff does not seek to prohibit the State Bar from lobbying, [but] merely from spending plaintiff's money to do so". Therefore petitioner's challenges appear to be monetary rather than ideological.

However, even assuming petitioner has strong ideological objections to certain State Bar positions, he "is still free to voice his own views on

grounds and therefore, like *Street*, could be of no precedential guidance.

any subject in any manner he wishes". *In re Unification of the New Hampshire Bar,* 109 NH 260, 266; 248 A2d 709, 713 (1968); accord, *Lathrop, supra,* 861 (Harlan, J., concurring in result).[28] He is not being forced to proclaim any ideological or political view. As Justice Harlan noted in his concurrence in *Lathrop, supra,* 859, "Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual.' *[In re Integration of the Bar,* 5 Wis 2d 618, 623; 93 NW2d 601, 603 (1958)]." More importantly, petitioner has many avenues open to him to express his ideas either through the Bar or outside of it. Petitioner may or may not wish to run for election to the Board of Commissioners or the Representative Assembly (see State Bar Rules 5 and 6), but in any event he may attend their meetings, since unless specifically voted to be closed all meetings are open to Bar members. In this way he can have direct input on the two governing bodies of the Bar. Similarly if petitioner has an interest in the Michigan Rules of Evidence, Criminal Code, Land Title Standards or other legislation and rules which the Bar reviews, he may attend the committee meetings and make known his feelings. Petitioner is also free to write letters to the editor of the Michigan Bar Journal

[28] In addressing the two dissenting opinions in *Lathrop,* Justice Harlan noted:

"I do not understand why it should become unconstitutional for the State Bar to use appellant's dues to fulfill some of the very purposes for which it was established. I am wholly unable to follow the force of reasoning which, on the one hand, denies that compulsory dues-paying membership in an Integrated Bar infringes 'freedom of association,' and, on the other, in effect affirms that such membership, to the extent it entails the use of a dissident member's dues for legitimate Bar purposes, infringes 'freedom of speech.' " *Lathrop, supra,* 850.

expressing his views and seeking support. If he chooses not to take part in the channels of communication within the Bar and is dissatisfied with the majority position petitioner may express and promote his views through external means such as the communications media.

In sum we find that the State Bar expenditures of dues revenues to fund committees for the purpose of examining proposed legislation and court rules is germane to the state's compelling interest in promoting the administration of justice and advancement in the science of jurisprudence. When taking a position on a proposed bill, rule, or order, the State Bar, however, must confine itself to those subjects directly affecting the administration of justice or the advancement of jurisprudence.[29] Since petitioner has failed to show and we cannot find in the record any specific expenditure of Bar funds to critique or lobby for any legislative or judicial action unrelated to the administration of justice we find that petitioner's rights are not unconstitutionally infringed.

(2) The Young Lawyers Section and the Right of Association

Petitioner also challenges the constitutionality of the automatic membership of newly admitted attorneys in the Young Lawyers Section (YLS). He contends that such "compulsory" membership violates his First Amendment right to freedom of association since he is being forced to join an organization without his consent and since a part

[29] Thus endorsing a particular candidate for office or lobbying for a bill which is unrelated to the improvement of the administration of justice is outside the scope of State Bar Rule 1 and also violates the First Amendment rights of free speech and association. See fn 8, *supra*.

of his mandatory Bar dues supports the YLS. The State Bar argues that "[n]obody is forcing petitioner to participate in the Young Lawyers Section nor to associate with other young lawyers". The Bar relies on *Lathrop, supra*, 827-828, where the majority of the Justices of the Supreme Court agreed that the Wisconsin State Bar did not, on its face, violate the right to freedom of association, noting: " '[H]is compulsory enrollment imposes only the duty to pay dues' " (367 US 827-828, quoting 10 Wis 2d 237 with approval).

We agree with the State Bar that "there is a definite professional/justice system interest in the integrating of young and new lawyers into the practice of law, and in dealing with the very special problems of these new professionals. Such a structure benefits not only the new attorney, but safeguards the public interest in the maintenance of the highest standards in the practice of law". Petitioner argues that newly admitted lawyers know more general, substantive law and are better "attuned to the most modern currents of thought in the law" than experienced practitioners. It is obvious, however, that most new attorneys necessarily have a substantial gap of practical knowledge and experience. Despite the trend to expose law students to various clinical experiences, law schools still emphasize traditional textbook courses, reasoning that the student will acquire the necessary practical and procedural knowledge after being admitted to the bar. We take judicial notice that a person is not automatically transformed from a struggling student to a skilled legal practitioner upon completion of the Bar admissions ceremony. The Young Lawyers Section can help the new attorney bridge the gap between law school and the practice of law.

Helping young attorneys find their way through

the maze of rules, regulations and laws in turn helps the legal system run effectively and provides for a better distribution of legal services to the public. If petitioner feels that he does not require this valuable aid he is free to disassociate himself from the Section: automatic membership does not mean that it is compulsory.[30] Petitioner, therefore, cannot constitutionally complain that the State Bar uses a portion of its general fund to support a section which is composed of young lawyers who voluntarily give their time and energy to sponsor seminars and programs to train the new attorney. Thus we find that ensuring that the legal system runs smoothly and efficiently is germane to the state's compelling interest of promoting improvements in the administration of justice.

(3) Prepaid Legal Services (4) Lawyer Referral

(5) Lawyer Placement (6) Client Security

The use of mandatory dues revenues for sponsoring Lawyer Referral, Prepaid Legal Services, Lawyer Placement and the Client Security Fund is also challenged by petitioner. His primary argument against such expenditures is that they do not constitute a public purpose and have not been authorized in accordance with the provisions of Const 1963, art 4, § 30.[31] Petitioner insists that

[30] Indeed, a Bar applicant could notify the YLS prior to the admissions ceremony of his wish not to become a section member, thereby never being "forced" to join the section. Or a newly admitted attorney can become a member for a trial period and, if dissatisfied, terminate membership.

[31] The State Constitution provides:

"The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes." Const 1963, art 4, § 30.

Since we have based the Bar's authority to promote the improve-

"[t]he use of State Bar dues monies to enhance the income producing opportunities, employability, and to guarantee trustworthiness of practitioners (via Client Security Fund), is thus invalid as not for a public purpose".[22] A secondary argument raised by petitioner is the all-inclusive charge that the First Amendment right of association prohibits any use of mandatory Bar dues revenue for non-"regulation" purposes.

As to the first argument that the expenditure of Bar funds for the challenged activities is not for a public purpose we note that petitioner's analysis of the purpose of the Bar program is inadequate. Except perhaps for the Lawyer Placement Service, none of the programs were instituted nor are presently conducted primarily for the benefit of attorneys even though, admittedly, some attorneys may benefit incidentally. Lawyer Referral and Prepaid Legal Services[23] were created in order to

ment in the administration of justice and advancement in jurisprudence upon State Bar Rule 1 we will not address plaintiff's attack on the constitutionality of MCL 600.901 *et seq.*; MSA 27A.901 *et seq.* See fn 19, *supra*.

[22] When asked to explain his objections to the Lawyer Referral Service, however, petitioner stated:

"I don't understand why I should be required to subsidize the income-producing opportunities of the attorneys in private practice when I have no interest in enhancing my own income-producing opportunities.

"*Q:* So it is your own economic interest that is the touchstone of this objection, is that correct?

"*A:* Yes, and the fact that an agency of the state for which I work precludes me from taking advantage of the service that I am required to subsidize."

[23] Lawyer Referral Service provides members of the public with the opportunity to consult with an attorney for a half an hour for a $15 fee to determine whether a legal problem exists, whether the problem merits further action by an attorney or whether it may be satisfactorily settled by the client. Thus a person seeking a divorce may be referred to an attorney, randomly selected from a list of lawyers competent in that area who agree not to charge over a set amount, while someone wanting to change his or her name would likely be instructed to go to probate court.

Prepaid Legal Services is analogous to Blue Cross insurance in that

make legal services more accessible to "that segment of the population, which studies have shown runs roughly around 70 percent, who do not consult lawyers for one reason or another, partly out of fear of the unknown and of how much lawyers would charge" (testimony of Michael Franck, Executive Director of the Michigan State Bar). See *Bates v State Bar of Arizona*, 433 US 350, 370, fn 22; 97 S Ct 2691; 53 L Ed 2d 810 (1977). Similarly the purpose of the Client Security Fund is not to insure attorneys for malpractice but to protect the public by reimbursing victims of a defalcation either by clients of lawyers or by a lawyer acting in a fiduciary capacity.[34] Therefore Lawyer Referral, Prepaid Legal Services and the Client Security Fund clearly constitute a permissible public service, rather than a private or local service, within the meaning of Const 1963, art 4, § 30.

As to petitioner's First Amendment argument

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an annual premium is usually paid by an employer and/or employee ensuring that up to a fixed amount of legal services would be available should the need arise. The purpose of Prepaid Legal Services is essentially the same as of Lawyer Referral in that both programs help deliver legal services to members of the public who otherwise might lack legal advice except that Prepaid Legal Services is more extensive in its scope of coverage.

[34] Petitioner admits that the Client Security Fund benefits the public but complains that it does not aid the general welfare of lawyers, "many of whom, like petitioner herein, either do not engage in professional activity related to the protective function of the Client Security Fund, or are precluded from doing so by the State as employer".

Petitioner would have this Court create a mandatory Bar Rule requiring private practitioners obtain insurance to replace the Client Security Fund.

There is a problem that the present malpractice insurance coverage, and indeed the whole concept of insurance, does not include protection for an intentional wrong. As Mr. Franck noted:

"[M]alpractice insurance, by the terms of all the policies, specifically excludes intentional misconduct and only covers errors and omissions to use a general term, so that claims that are eligible for payment by the Client Security Fund would, by definition, not be eligible for coverage under professional liability insurance."

relative to these services, since they either provide legal assistance to those who would otherwise be without it or protect those who do employ lawyers, the relationship to the administration of justice is clear and hence germane to a compelling state interest.

The Lawyer Placement Service presents a closer issue. For a fee of $5 any attorney, newly admitted or an experienced practitioner, may register with the Placement Service for up to 12 months, or until employment is secured. Employers searching for attorneys with certain qualifications are charged a $10 registration fee. The Placement Service acts as an information clearinghouse, gathering application forms and job descriptions and passing the collected information on to the registrants.

Petitioner objects to the State Bar subsidizing the postage, printing, staff and building space of the Placement Service. He perceives this service as being a private purpose within the meaning of Const 1963, art 4, § 30 since at any one time it only benefits a relatively few attorneys. Petitioner claims that Lawyer Placement is just another unnecessary service of the Bar which he is being unconstitutionally compelled to support in violation of his First Amendment right of freedom of association.

Lawyer Placement provides a necessary and useful service for the legal profession and the general public. By providing a focal point for the gathering and dispersal of employment information, the Bar program aids attorneys and society in efficiently utilizing legal skills and services. Placing attorneys where legal services are required aids in the administration of justice. As a consequence, Lawyer Placement, which facilitates

locating attorneys where needed, is germane to the administration of justice.

(7) Informing the Public of their Legal Rights and Responsibilities

(8) Lawyers Wives and Children's Charter

Petitioner also objects to the use of Bar funds to promote legal services and to inform the public of the availability and need of legal services. He similarly objects to the use of Bar revenues to fund Lawyers Wives[36] and Children's Charter.[38] Petitioner claims that the use of mandatory Bar dues monies to promote the above activities violates his First Amendment right of association. For example, petitioner, as an unmarried attorney, has no interest in Lawyers Wives whatsoever. Being an attorney, petitioner would also have no need to be informed of the availability of legal services. Nevertheless we hold that the services performed by Lawyers Wives, Children's Charter

[36] Lawyers Wives of Michigan, composed of spouses of both male and female attorneys,

"is an organization which provides a home * * * for spouses of those in our profession. Its particular interest and activity has been in the area of law related education."

Lawyers Wives distributes the booklet "You and the Law" to junior high school students throughout the state; conducts an annual Law Day essay contest for junior high school students; and provides volunteer services in probate and juvenile court.

[38] Children's Charter of Michigan

"is a Michigan non-profit corporation which is essentially a consortium of juvenile judges, social workers and officers assigned to juvenile work in the various police departments throughout the state, including the Michigan State Police. They deal with collective problems of juvenile delinquency and other juvenile problems that require the interjection of third parties in the process, including non-status offenders. They meet regularly during the summer months at regional conferences to hear papers, to discuss issues and to educate one another on the subject. * * * The contribution has been fixed at $1,000, as Mr. Franck has testified, for some years, in order to underwrite the cost of these conferences which consist of travel for the speakers and renting of the hall."

and the Bar public education communications are germane to the state's interest in improving the administration of justice.

A legal system, no matter how fair or just, is of little value if no one knows of its existence or how to effectively use it. By providing the public with pamphlets explaining various areas of the law in easily understandable language the State Bar is helping Michigan citizens gain effective access to the legal system. Similarly when Lawyers Wives volunteer their time and effort to distribute brochures to school children, conduct Law Day essay contests and serve probate and juvenile courts they are aiding the state legal system. We therefore find that the expenditure of State Bar dues revenue on public communication, Lawyers Wives and Children's Charter is germane to the state's compelling interest in promoting improvements in the administration of justice and advancements in the science of jurisprudence.

(9) State Bar Social Functions and Judicial Attendance

Petitioner claims the State Bar violates his First Amendment rights of association by expending some of his mandatory dues on offering food and beverages on particular occasions such as the State of the Judiciary Address and Law Day. He also complains that justices and other judges improperly are present at some of these occasions.

To begin with, there is no original jurisdiction in this Court to consider the alleged judicial improprieties, and petitioner is advised to seek the proper forum.

The problem of juxtaposing the majesty of the First Amendment with a minor complaint such as

petitioner's about the offering of food and beverages is that there is a danger of focusing on whether the minor activity rises to the dignity of being a compelling state interest, which, of course, it is not. The pertinent question, however, is whether the minor activity is germane to a more significant activity which fulfills a compelling state interest.

Obviously one can easily imagine dining occasions which have no relationship to the administration of justice or the advancement of jurisprudence whatsoever. Expenditure of funds for these would be offensive not only to the First Amendment but Rule 1. On the other hand, there are other dining occasions that support activities germane to the State Bar's performance of its duties in the improvement of the administration of justice and the advancement of jurisprudence. With that in mind let us focus, for example, on one of petitioner's objections, dining functions in connection with Law Day.

We can take judicial notice that in connection with Law Day there is an essay contest about law-related subjects for young students. The statewide winners, their parents and teachers are brought to Lansing to a Bar-sponsored luncheon attended by prominent attorneys and judges. The highlight of the occasion, of course, is the presentation of awards to the young winners.

Is the use of mandatory bar dues monies for such an occasion germane to the administration of justice? We have already determined that educational programs acquainting the public with the operation and availability of the justice system is germane to the administration of justice. A luncheon of the kind just described is certainly a legitimate expense in the fulfillment of such an

objective and therefore germane to the administration of justice.

We therefore hold that expenditure of mandatory bar dues for the holding of social functions by the State Bar is not per se an invasion of petitioner's First Amendment rights. Such expenditures may be constitutionally permissible if in support of a social function which is a legitimate part of a Bar activity germane to the administration of justice or the advancement of jurisprudence. For example, those in connection with the State of the Judiciary Address and Law Day, if otherwise proper, do not offend petitioner's First Amendment rights.

(10) Support of Judicial Salaries Before SOCC

Petitioner argues that the appearance by State Bar representatives before the State Officers Compensation Commission (SOCC) to support higher judicial salaries, including salaries of members of this Court, is unlawful and improper. Petitioner claims that the expenditure of Bar resources to send a person to the SOCC is unnecessary to the Bar's "regulatory" function and therefore violates his First Amendment rights of association and speech. He also argues that permitting the State Bar to lobby for higher wages for judges is improper since it violates Canon 2(A) of the Michigan Code of Judicial Conduct[37] as constituting an appearance of impropriety. As to this last objection, we have already indicated that the Supreme Court

[37] Canon 2(A) states:

"Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

is an inappropriate forum in which to initiate such a complaint.

Employment of competent jurists is essential for the effective administration of justice. We take judicial notice that several years ago this country was concerned with the number of eminent federal judges who were resigning due to inadequate salaries. Congress has repeatedly found it necessary to raise the salary of federal judges in order to not only attract, but retain, the top minds of the legal profession who would otherwise engage in private practice. The Michigan Legislature established the SOCC to ensure that top positions in the public sector, such as judges, would be able to compete with the private sector for well qualified and dedicated men and women. By paying competitive salaries the SOCC ensures that the state is not handicapped in drawing and maintaining able jurists. We see nothing improper in the State Bar aiding the state in determining what salaries are necessary to have an effective judiciary, "for the labourer is worthy of his hire". Luke 10:7.

Permitting the State Bar to express its position concerning increases in judicial salaries, whether in favor or opposed, is germane to the state's compelling interest in the administration of justice.

(11) Use of State Bar's Mailing List for Commercial Purposes

Finally, petitioner contests the use by the State Bar of its mailing list for commercial purposes. He maintains that he is an unwilling recipient of "junk mail" resulting from State Bar commercial mailings in violation of his right to privacy. The Bar admits that it mails insurance and travel company solicitations to Bar members but claims

that it carefully screens the use of the list and takes various safeguards, such as never allowing the list to leave its possession, to ensure that only commercial offers of interest to the general membership will be mailed. Respondent also insists that "both the individual attorney and the State Bar receive a benefit from the programs" since the Bar is totally reimbursed for its mailing service while "individual attorneys receive the benefit of group rates which would otherwise be unavailable". Finally the Bar maintains that there is no right not to receive mail, claiming that the right to privacy does not apply here in any event: "[A]ny intrusion is minimal inasmuch as anyone not wishing to receive such mail may certainly disgard it without opening it, since the nature of the communication is clearly indicated on the outside of the envelope".

We disagree. *Rowan v United States Post Office Dep't*, 397 US 728; 90 S Ct 1484; 25 L Ed 2d 736 (1970), which upheld Title III of the Postal Revenue and Federal Salary Act of 1967, 39 USC 4009, now recodified as 39 USC 3008,[38] against constitutional attack, provides guidance on this issue. Although the challenged statute was enacted in order to give recipients of obscene mail the power

[38] The recodified statute, virtually unchanged from its predecessor, states:

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees." 39 USC 3008, subds (a) and (b).

to remove their names from such mailing lists, *Rowan, supra,* 731-734, the Supreme Court took a broader approach. Chief Justice Burger, writing the opinion for the unanimous Court, noted:

"Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.

"In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

* * *

"[T]he mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.

"To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communi-

cation, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. see *Camara v Municipal Court*, 387 US 523 [87 S Ct 1727; 18 L Ed 2d 930] (1967)." *Rowan, supra*, 736-737.

Petitioner's right to privacy, "to be left alone", inherently includes the power to have some discretion in what enters his home through the mail. Congress recognized this in passing 39 USC 3008, thereby giving the addressee the authority to stop mailings to his home which he, "in his sole discretion believes to be erotically arousing or sexually provocative". The Supreme Court expanded this power, if only by dicta, to allow the addressee to strike his name from any mailing list. To require the Bar to honor petitioner's request to remove his name from the commercial mailing list would require the burden and added expense of keeping two mailing lists. Depending on how many attorneys opt for removal of their names the Bar may, or may not, be able to maintain the group rates it now provides for its members. Even though petitioner can easily identify the soliciting mailing by its clearly marked envelopes, thereby lessening the intrusion into his privacy, he has the right to demand that his name be excluded from mass merchandising mailing lists since the state cannot be said to be promoting the administration of justice or advancing the science of jurisprudence through this type of mailing.[39]

[39] We restrict our ruling to commercial mailings unrelated to the Bar's authorization to aid in the improvement of the administration of justice and to promote the advancement of jurisprudence. Thus insurance and travel advertisements may be restricted while mailings

V. CONCLUSION

Petitioner has failed to prove a case for relief in any of the specific categories set forth in his complaint and briefs except for item 11 relating to the sale of the use of the State Bar mailing roster. (But see fn 8.)

Therefore the State Bar shall, on petitioner's request, remove his name from the roster sold for commercial use. With respect to all other challenges petitioner's request for relief is denied.

No costs, a public question being involved.

COLEMAN, C.J., concurred with WILLIAMS, J.

LEVIN, J. The issues, facts and history of this proceeding are set forth in Justice RYAN'S and Justice WILLIAMS' opinions.

We have concluded that while the record is sufficiently developed to resolve some of the issues, it is insufficiently developed to resolve others, and therefore the cause should be remanded for a further hearing.

I

The record in this case is sufficiently developed to resolve the challenges to all bar activities save the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar and the public about the law and the legal system, the Lawyer Placement Service, the commercial sale of the bar's mailing list, and activities addressed to influencing legislation. Activities addressed to influencing legislation include not only lobbying activities but also the

announcing continuing legal education programs, which plaintiff concedes are within the Bar's proper function, may not be so limited.

adoption of formal bar positions on proposed legislation and social functions in furtherance of legislative activities.

In ordinary litigation, a party's failure to develop an adequate record would, according to the appropriate allocation of the burden of proof, control the disposition of the case. This case is not, however, an ordinary litigation in which a party is limited to the relief to which he has proven himself entitled. Falk's petition calls for the discretionary exercise of this Court's extraordinary superintending control. We must consider, therefore, not merely the relative rights of the parties before us but, rather, the proper organization and actions of the bar in light of the rights of all its members and the interests of the state.

When this Court exercises its power of superintending control, the Court has the responsibility of ensuring that it is fully informed. To allow inadequacies in the record to shape the order affecting the rights of persons other than the parties would be to cede a measure of our discretion to the parties.[1] We conclude that a more complete factual record is needed to determine the appropriate

[1] Falk commenced this action as an orginal proceeding in this Court denominating it "Petition for Special Relief". No statute or court rule expressly authorizes such a petition. If the petition were an ordinary lawsuit claiming violations of Falk's constitutional rights, it should have been filed in a circuit court. If regarded as an action for a writ of mandamus against a state officer, it should have been commenced in the Court of Appeals, or the circuit court for Ingham County or other county in which venue was proper. MCL 600.4401; MSA 27A.4401. This Court has elected to treat Falk's petition as a request to exercise the Court's statutory power to regulate the conduct and activities of the bar. MCL 600.904; MSA 27A.904.

As such, this proceeding is more in the nature of a rule-making proceeding than a lawsuit; what character it has as a lawsuit is the result of this Court's action in appointing a judge to conduct a hearing and make findings of fact.

Since this is not a lawsuit, or even an action whose procedure is delineated by statute, court rule or precedent, it is inappropriate to limit our consideration of the issues presented in this proceeding according to the rules circumscribing lawsuits. To determine the

order as to the bar's legislative activities, the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar about the law and the legal system, the Lawyer Placement Service, and the commercial sale of the bar's mailing list, and therefore remand for the purpose of developing such record.

II

The controlling decisions of the United States Supreme Court on the First Amendment issues in this case, *Hanson*,[2] *Street*,[3] *Lathrop*,[4] and particularly *Abood*,[5] are fully discussed in Justice RYAN's opinion.

Some may read *Abood* as concluding that any compelled association and support, whether for collective bargaining purposes or otherwise, so intrudes upon the First Amendment rights of individual members as to be permissible only for purposes germane to those activities of the unified organization which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting members.[6]

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scope or content of an order regulating the bar according to burdens of proof or inadequate showings in the record we ordered would be to treat this proceeding as the lawsuit it clearly is not.

[2] *Railway Employes' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956).

[3] *International Ass'n of Machinists v Street*, 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961).

[4] *Lathrop v Donohue*, 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961).

[5] *Abood v Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977).

[6] The Court in *Abood* observed, as to the collection of dues to support collective-bargaining activities:

"To compel employees financially to support their collective-bar-

gaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood, supra*, p 222.

The Court further observed, as to dues collected for purposes other than collective bargaining:

"Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. * * * Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. * * * The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

"One of the principles underlying the Court's decision in *Buckley v Valeo*, 424 US 1 [96 S Ct 612; 46 L Ed 2d 659 (1976)], was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals,' *id.*, at 22, the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interests,' *id.*, at 23.

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. * * * And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is

Others may read *Abood* as providing that while the state interest served by required association and financial support must be a compelling interest, any activity germane to that interest, rather than only those least intrusive upon members' First Amendment rights, is permissible.[7]

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that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd of Ed v Barnette*, 319 US 624, 642 [63 S Ct 1178; 87 L Ed 1628 (1943)].

"These principles prohibit a State from compelling any individual to affirm his belief in God, * * * or to associate with a political party * * * as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Abood, supra*, pp 233-235.

[7] The Court in *Abood* stated:

"We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward *the advancement of other ideological causes not germane to its duties as collective-bargaining representative*. Rather, the Constitution requires only that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Abood, supra*, 235-236. (Emphasis supplied.)

Where the intrusive limitation on association *directly* affects the First Amendment right of expression (here political expression), as where a statute precludes voting in one party's primary within 23 months after voting in another party's primary, *Kusper v Pontikes*, 414 US 51, 58-59; 94 S Ct 303; 38 L Ed 2d 260 (1973), or where not belonging to a particular political party results in discharge from a government job, *Elrod v Burns*, 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality), the Court has adopted the strict, "least intrusive means" test. For example, in concluding that the Illinois Election Code violated the First Amendment by prohibiting a person from voting in a primary election of a political party if that person had voted in another party's primary within the previous 23 months, Justice Stewart described when and how the least intrusive means test applies:

"[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. * * * For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. * * * If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper, supra*, pp 58-59.

Alternatively, still others may read *Abood* as applying different standards of judicial scrutiny according to the nature of the activity: dues collected to support collective-bargaining activities may be considered as assessments imposing the cost of obtaining an economic benefit on the beneficiaries, subject to the lower standard of scrutiny outlined in *Hanson* and *Street*,[8] while mandatory

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In contrast, where the intrusive limitation on association *indirectly* affects the First Amendment right of expression, as where employees, though free to express their own views without limitation, are required to pay dues to a union which may hold views different from the employees, *Abood, supra*, pp 225-226, the Supreme Court may have adopted the less restrictive "germane" test.

[8] While the Court in *Abood* recognized that compulsory support of collective bargaining activities had an "impact" on First Amendment "interest", and that such support "might well be thought * * * to interfere in some way with an employee's freedom to associate", *Abood, supra*, p 222, the opinion may be read by some as concluding that strict scrutiny was not appropriate to assess that interference. The Court relied on the analysis in *Hanson* and *Street*, saying "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress". *Id.*

Both *Hanson* and *Street* dealt summarily with the First Amendment issues posed by mandatory dues, initiation fees and assessments for collective bargaining activities. Finding that the congressional provision for union shops was a permissible exercise of the power to regulate interstate commerce, the Court in both cases found that requiring " 'support of the collective-bargaining agency by all who receive the benefits of its work * * * does not violate either the First or the Fifth Amendments'". As expressed by Justice Douglas, the author of *Hanson*, concurring in *Street*:

"We * * * concluded in * * * *Hanson* * * * that it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost. That is the narrow and precise holding of the *Hanson* case * * *."

Collective bargaining is an effort primarily aimed at furthering the economic or commercial interests of a union's membership. The commercial nature of conduct claimed to be constitutionally protected has sometime led the Court to adopt a lower standard of protection than is accorded non-commercial activities. Similarly, compelled association and support in furtherance of commercial activities, as distinguished from ideological activities, might be considered by the United States Supreme Court to be less intrusive on First Amendment rights. See, *e.g., In re Primus*, 436 US 412, 437-438, and fn 32; 98 S Ct 1893; 56 L Ed 2d 417 (1978), distinguishing *Ohralik v Ohio State Bar Ass'n*,

dues collected for purposes other than promoting the economic self-interests of members are subject to the higher standard applied in *Abood* to activities not germane to the collective-bargaining process.

Application of the principles announced in *Abood* to the instant case is further hampered by the indefiniteness, on this record, of the purposes and state interests served by the bar. Section 1 of the State Bar Rules, promulgated by this Court pursuant to the Court's powers over the Bar and its members, states:

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436 US 447; 98 S Ct 1912; 56 L Ed 2d 444 (1978), and the solicitation of clients for expressive as opposed to commercial purposes:

"Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is 'an associational aspect of "expression"' * * * and other activity subject to plenary regulation by government. * * * As shown above, appellant's speech—as part of associational activity—was expression intended to advance 'beliefs and ideas.' In *Ohralik* * * *, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw * * *, but that is no reason for avoiding the undertaking."

It should be noted, however, that the Court in *Abood* said that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry". *Abood, supra*, p 232.

Assuming that the State Bar may, without contravening First Amendment rights, engage in activity designed to promote the economic interests of its members, it should be noted that any group similar in size and variety of membership to that of the bar may be expected to face difficult questions when allocating resources. Activities enhancing the economic opportunities of litigators may not similarly benefit corporate lawyers, for example. Indeed, activities such as lobbying for defeat of motor vehicle no-fault insurance legislation might work to further the interests of personal injury litigators at the expense of other types of litigators by committing limited judicial resources to motor vehicle tort actions, thereby increasing delays and other disincentives to the bringing of other types of actions. Such conflicts, and the requirement that members contribute to an association which may, therefore, undercut their self-interests, may not be adequately ameliorated by the democratic process within the bar.

"The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State."[9]

This broad statement of purpose is susceptible to both expansive and restrictive interpretations. On the one hand, the bar represents the collective experience of legal experts in many fields, and its views on legislation as substantive as revisions of the criminal code, changes to the divorce laws, and no-fault insurance may serve compelling state interests. On the other hand, the threatened and actual intrusions upon individual members' First Amendment rights occasioned by compelled support of substantive issues to which they are opposed may make it proper or even constitutionally necessary to limit this broad statement of purpose to the promotion of issues which are directly related to the the practice of law and administration of justice as defined in their narrowest senses, such as court reform, lawyers' education, and requirements for the practice of law, or to eliminate entirely bar legislative activities funded by compulsory dues.

The question is made more complex by the unique relationship between lawyers and the law. Laws are the tools of the lawyer's trade; to improve those tools generally requires legislative activity. Laws are the substance of the lawyer's business; changes in the law will often affect the economic interests of the profession. Further, both by training and daily experience, lawyers possess an expertise in the practical functioning of laws

[9] 340 Mich xxxviii (1954).

and the justice system which may make their views on legislation of unique value.

Yet it is clear that a line must be drawn. The lawyer's relation to the law could rationally support the bar's taking a stand on even the most basic of public policy issues.[19] At some point, the

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[19] Selections from the record illustrate the bar's tendency to blur the interests of attorneys *qua* attorneys with the general public interest. Unless noted, all questions were posed by counsel for the bar; all answers are those of the Executive Director of the bar.

As to the lobbying activity of the bar:

"Q. Mr. Franck, is it not fair to say that given the complexities of society today, given the increasing participation of governmental agencies in the life of our society, that for any group, let alone a formally organized group of lawyers, to function, that there must be constant contact with government at every level by that organization?

"A. Yes. And then of course it's particularly true, in my judgment, of the legal profession since its function and contribution to society is to deal with the law and the law, obviously, is the function of the three branches of government. So it is almost by definition that the profession can carry out those functions assigned to it by society only by involving itself in the governmental process which creates the law with which the profession deals.

"Q. Ergo the bar must lobby?

"A. Yes, sir."

As to the distinction between bar lobbyists and other lobbyists:

"Q. *(Mr. Falk)*: The question was: Doesn't a lobbyist for the UAW have an interest in labor. * * *

* * *

"A. I'm sure he does, but he is paid to produce a certain result and therein lies a tremendous distinction between any activity the State Bar has with members of the Legislature.

"Q. *(Mr. Falk)*: Doesn't the State Bar attempt to get legislation favorable to the legal profession as it views it?

"A. To the legal profession, but—and the judiciary, but more important to the public because our profession, as we all recognize, the bottom line is to better serve the public. That's what it's all about.

"Q. *[Mr. Falk]*: Is what constitutes service to the public judgmental or objective?

"A. Well, I suppose that what you think is service to the public may be different than what I think, but it is the collective judgment of the State Bar."

As to the political activities, in general, of the bar:

"Q. Why are those activities related to the life of the organized bar?

"A. Because the life of the profession is to work through law, whether that law is specific statute, court rule, municipal regulation,

and that is where the profession works; that is where its expertise and where its ability to contribute to the public's understanding and development and welfare lies. So those are the areas in which the profession works and the organization of the profession works in those areas as an organization."

As to the types of legislation of interest to the bar:

"A. [W]e are now increasingly both choosing to involve ourselves with non-lawyer organizations in the consideration of issues involving substantial elements of public policy and by contrast from the other side major representatives of non-lawyer organizations, consumer organizations, union organizations and organizations of that kind are seeking out the State Bar in the consideration of problems of major public concern and seeking development of appropriate solutions to those problems.

* * *

"Q. Are these issues germane to the life of the State Bar?

"A. Yes, sir. They involve facets of the administration of justice.

"Q. In your opinion, Mr. Franck, are they germane to the life of the profession of law in this state?

"A. Yes, sir.

"Q. Why?

"A. Because they all affect the contribution of the profession to the evolution and existence of the society in which we live and those unique aspects of societal problems that the law and profession of the law concern themselves with."

"A. * * * The entire public skepticism about institutions, about laws, about the obligations of government, has, as we all know, increased dramatically. That has had tremendous ramifications in terms of proposed legislation, areas that are now fair game for legislative intervention so that that has to be considered, for the courts' rule-making powers have increased tremendously and the bar is almost a unique institution, for example, in terms of legislative process, whereas almost every other organization which has a membership component is interested in a very limited number of bills each session. For example, namely only those that affect membership. Most legislation does not directly affect lawyers as members of the State Bar of Michigan, but it does affect lawyers and their clients and their lives, and therefore, compared to other organizations we have an interest in almost every bill that is introduced over in the Legislature.

"Q. Now, is that interest in behalf of the profession or is that interest on behalf of the public, in fulfillment of the profession's judiciary responsibilities or a combination of both?

"A. It is—

"Q. Characterize it.

"A. It is really a combination of both. The viewpoint of the lawyers on public questions is very much shaped, obviously, by whom they represent, but in that reflection is the views and the concerns and indeed the experience of their clientele and those persons in the public that they represent. And of course another thing that is unique

interests of the bar and the state in collective legislative activity by the bar must yield to the constitutional freedoms of the individual lawyer.

III

It is unnecessary at this time to determine the appropriate standard of judicial scrutiny or to definitively articulate the bar's purpose, since such of Falk's challenges to bar activities as can be resolved on this record are clearly permissible even under the strictest standard of review and the narrowest construction of the bar's purpose.

A

Few would argue, and Falk himself is not one of them, that maintaining high standards of competence and honesty in the legal profession does not serve a compelling state interest. The bar's regulatory and licensing activities narrowly drawn to that end can be justified even if they impinge on members' First Amendment rights. Included among these activities are: continuing legal education, the Michigan Bar Journal to the extent it serves an informational function, advisory opinions on ethical questions, and disciplinary proceedings.

Whatever may be the proper use by the Court of members of the bar to improve the administration of justice, it includes, at the very least, activities primarily to educate the public about the law and legal services, to provide legal services to the indigent, to help the public to select legal counsel

about the profession is that there are lawyers on every issue who reflect every shade of opinion, every portion of the public that would be affected by proposed legislation, indeed has an interest or viewpoint on proposed legislation."

through the Lawyer Referral Service, and to provide forums for discussion of problems facing the courts and the legal profession.

That the state has a compelling interest in improving the administration of justice through activities such as these needs no explication. Compulsory dues are a necessary means both to provide adequate funds and to equitably share the burden among those subject to the duty. Limiting the compulsory element to a reasonable level of dues is the least intrusive means available. No actual participation by Falk is required beyond the financial obligation. This Court and the majority of the profession may rely on the volunteering of time and energy by members of the bar and other groups; without, at a minimum, the financial support to meet the expenses of these activities, they might end or be severely restricted.

Some of the non-legislative bar activities challenged by Falk fall comfortably within the permissible range of this category of activities. Without attempting to be exhaustive, activities such as the preparation and distribution by the Young Lawyers of the Juror's Manual, the distribution to junior high school students of the "You and the Law" booklet by the Lawyers Wives of Michigan, and funding of the Children's Charter, which provides a forum for discussing problems of juvenile delinquency requiring participation of third parties, are examples of clearly permissible activities.

B

Other activities of the bar challenged by Falk, including activities of the Young Lawyers Section and Lawyers Wives other than those described above, the Lawyer Placement Service, the commer-

cial sale of the bar's mailing list, and particularly bar activities addressed to influencing legislation, require development of a fuller and more particularized record before their permissibility can be determined.

On remand, the burden will be on Falk to show specific activities which allegedly infringe upon his First Amendment rights. The burden will be on the State Bar to establish the requisite state interest, the appropriate connection between particular activities and the state interest (or, if a valid criterion for First Amendment purposes, the economic self-interest of the bar's members), and the unavailability or impracticability of alternative means of realizing the asserted state interest. Particular attention should be given to specific evidence of what the bar is doing; how it came to be doing it; how and under what standards it chooses issues on which to take an official stand and which stand to take; whether any ground rules exist for declining to take an official position, with details of instances when the bar has so declined; whether any procedure exists for encouraging, receiving and presenting dissenting opinions; what alternatives are possible to accommodate the First Amendment rights of dissenting members; what impact alternatives will have on the effectiveness of the bar's assistance to its members, the public and this Court; and the proposed times and procedures for implementing alternatives.

We emphasize that the Court is not now deciding, nor intimating an opinion on, either the appropriate standard of judicial scrutiny or a definition of the state interests served by the bar. These issues have been discussed to indicate the kind of record which should be developed on remand and

to provide focus for briefing and argument after remand.

After remand, the Court will also consider, and the parties should address, whether a fair analysis of the purposes served by those bar activities presenting close questions of constitutional conflict and of alternatives thereto indicate that a better course would be to exercise the superintending authority of this Court by court rule to limit the activities of the bar to a greater degree than is absolutely compelled by the Constitution, and thereby eliminate the potential for constitutional conflict. Such an approach may not only serve the important goal of avoiding unnecessary decision of constitutional questions, but may also provide a desirable measure of flexibility in an area that will almost certainly change with time. Further, a proper respect for the "breathing room" necessary for full enjoyment of First Amendment rights suggests that this Court should be reluctant to allow bar activities to press upon the border of constitutional prohibition, absent a clearly demonstrated need therefor.

An appropriate order will enter. No costs, a public question.

KAVANAGH, J., concurred with LEVIN, J.

ORDERS ON REHEARING

State of Michigan
In the Supreme Court

ALLAN FALK,
Plaintiff,

-v- No. 60722

STATE BAR OF MICHIGAN,
a public body corporate,
Defendant.
_____/

Rehearing No. 105

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED. *I, Corbin R. Davis, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 6th day of March in the year of our Lord one thousand nine hundred and eighty-four.*

/s/ Corbin R. Davis, Clerk

Rehearing No. 39

In this cause a motion for rehearing is considered and, on order of the Court, is hereby DENIED without prejudice to plaintiff's presenting the issues raised in further proceedings in this pending cause. *I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in*

said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 8th day of September in the year of our Lord one thousand nine hundred and eighty-one.

/s/ Corbin R. Davis, Deputy Clerk

JUDGMENT OF THE MICHIGAN SUPREME COURT

State of Michigan
In the Supreme Court

ALLAN FALK,
Plaintiff,

-v- No. 60722

STATE BAR OF MICHIGAN,
a public body corporate,
Defendant.
/

This cause having been brought to this court by petition for superintending control and having been argued by counsel and due deliberation had thereon by the Court, IT IS HEREBY ORDERED that the petition is DISMISSED.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 6th day of March in the year of our Lord one thousand nine hundred and eighty-four.

/s/ Corbin R. Davis, Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

State of Michigan
In the Supreme Court

No. 60722

ALLAN FALK,

Appellee,

v.

STATE BAR OF MICHIGAN,

Appellant.

(Filed May 24, 1984)

Pursuant to United States Supreme Court Rule 10, notice is hereby given that Allan Falk appeals to the Supreme Court of the United States from the final judgment entered by the Supreme Court of Michigan, dismissing Allan Falk's Complaint for Superintending Control entered in this cause on March 6, 1984.

This appeal is taken pursuant to the provisions of 28 USC § 1257(2).

Respectfully submitted,

/s/ ALLAN FALK
Attorney for Appellee
2001 N. Fairview
Lansing, Michigan 48912
(517) 373-7388
In propria persona

WITNESS BY WITNESS SUMMARY

1. David Jordan, Commissioner
   Michigan Court of Appeals

A former Deputy Insurance Commissioner, Mr. Jordan testified that the Client Security Fund could be replaced by standard forms of fiduciary bonding, and that the commercial alternative is both practical and an improvement in many respects over the existing system, without contravening the rights of those not in private practice.

Jordan also testified that, personally, he opposes philosophically the State Bar's lobbying activities.

2. William S. Ballenger, Director
   Department of Licensing & Regulation

A former State legislator and Assistant Secretary of HEW, Ballenger, from his perspective as head, for five years, of the Michigan agency regulating 44 licensed occupations, testified about the history of the concept of "professionalism", equating it with guildism and monopolization. He noted the poor track record of professional regulatory boards generally, and felt that, in terms of public respect and opinion, lawyers are at least as bad if not worse than other licensed occupations. He summarized comments he had heard around the State by describing the bar as a "very cozy, insidious private guild." The manner in which the bar enjoys self-regulation is "probably a far more controlled and controllable" system "than any system I've seen in any of the other professions, particularly those housed in the Department of Licensing and Regulation." He suggested that, for starters, the Governor, rather than the Supreme Court, appoint members of the various legal regulatory boards and

commissions, without being restricted to a list of nominees submitted by any part of the bar or the judiciary.

Ballenger noted that one characteristic of a licensed profession that distinguishes it from other occupations is its ability to engage in effective political lobbying, since professional recognition begins with a statutory monopoly.

3. James L. Shonkwiler, Executive Secretary
Prosecuting Attorneys Coordinating Council and
Prosecuting Attorneys Ass'n of Michigan

Testifying in his capacity as head of PAAM, Shonkwiler indicated that prosecutors generally do not feel that the State Bar serves their interests, and hence the public interest in many respects. No prosecutor has ever served on the Board of Commissioners. Shonkwiler felt that the Board of Commissioners operates in a generally high handed manner, in contrast to the PAAM, which confines its public espousal of a position to those cases in which there are no significant differences of opinion among its members. The PAAM, unlike the State Bar, also goes to some pains to solicit the views of its members, polling them when practicable. To the extent compulsory dues fund the State Bar's lobbying activities, the PAAM finds it more difficult to propagate its contrary views, even though all its members are also members of the State Bar.

4. Martha Seaman, Legal Draftsperson
Legislative Service Bureau

Ms. Seaman described the work of the LSB, its ability to provide the legislature with draft legislation based on legal and factual research without propagandizing the views of an interested or biased party. From a technical standpoint,

Seaman felt the LSB offers the best possible assistance to the legislature (N.B. Judge Lincoln and, later, Patrick Keating, indicated that in some situations only experienced practitioners have the requisite technical expertise to appreciate how theory can be translated into practice).

5. F. Martin Tieber, Director, Lansing SADO
Chairman, Defender Systems & Services Committee

Tieber's committee spent two years doing a fee study of trial and appellate appointed criminal defensive work, along with a smattering of attention to minor court rule revisions and legislation. The committee concluded that the fee system for private sector appointed criminal defense attorneys is intolerably low. He particularly criticized the flat fee system, e.g. Wayne County (by local court rule, WCCR 14.13 (k), the fee for an appeal is $250 for claim of appeal and brief; $50 for each 1/2 day in circuit court; $100 for the transcript plus $100 for each 400 pages after the first 400, motion fee of $50, and $50 for a jail visit.). Tieber admitted that half of all appeals are from guilty pleas, and that two-thirds of the members of his committee would increase their incomes if fees were raised. Tieber noted that two voluntary groups, the Lawyers Guild and the Defenders Association of Michigan, could equally well have performed this study, but neither has the political clout of the State Bar, and thus the chance for legislative amelioration of inadequate fees is better when the impetus comes from the State Bar.

6. Carol Ann Wilson, President
Lansing Chapter National Lawyers Guild

The Lawyers Guild, a voluntary organization dedicated to improvements in the administration of justice, consists

mainly of lawyers, with some students and paralegals. Devoted mainly to human rights, constitutional and political issues, the group has been active in farm labor litigation, prisoner litigation, anti-KKK work, sex and race discrimination programs, and has lobbied the legislature and the public on matters of concern, e.g. Proposal E (tax increase for new prisons). It instituted a prison lockdown relief suit, a suit against the Department of Corrections that resulted in expanded programs for women prisoners, another suit against the Department of Corrections challenging the department's drug offender classification system *vis a vis* prison placement programs, and has provided legal assistance to Iranian students facing immigration difficulties and to victims of domestic abuse. The Guild has also pressured the Lansing Police Department to enforce certain domestic abuse laws, and has conducted conferences and workshops to educate the public about these problems.

7. John Braden, Private practitioner; Secretary Mecosta-Osceola Bar Association

Braden, a member of the Board of Directors of Legal Aid of Western Michigan, took umbrage at State Bar lobbying efforts designed to induce Congress to continue funding of the Legal Services Corporation, personally believing, as does President Reagan, that voluntary funding for indigent legal services is both preferable and possible. On his motion, the Mecosta-Osceola Bar Association unanimously passed a resolution opposing the insertion of the State Bar of Michigan into this political controversy.

Braden personally opposes State Bar lobbying generally, and on specific issues — he favors abolition of the "American Rule" on awarding attorney fees, and supports an elected judiciary, both in contrast to positions of the State Bar. He noted that use of his compelled dues in support of

lobbying by the bar makes it more difficult and expensive for him to petition the government for a redress of his grievances, both by reducing the funds available to him for the purpose, and by making his task more onerous by raising the level of opposition he must overcome.

8. Linda Coleman Shirkey, Director, DSS Office of Legal Affairs
Co-Chairperson, Committee on Mentally Disabled

This committee has been involved in a variety of long term projects:

(1) Drafting guidelines for defense counsel in civil commitment proceedings;

(2) Basic skills seminar for young lawyers in civil commitment cases;

(3) Televising live testimony of psychiatrists in Oakland County Probate Court commitment cases, in conjunction with Department of Mental Health;

(4) Studying the efficacy of the Mental Health Code.

Due to the cross-sectional expertise of the committee, it acts as counsel to the legislature on legislation proposed by others.

Coleman Shirkey acknowledged that the same job could be performed by a voluntary bar association, but doubted it could be done as effectively (on theory a voluntary bar would not be able to draw on as wide a cross-section of talent). She recognized that when the State Bar publicly advocates a position it is trading on the collective reputation of all lawyers, including those who disagree with that position.

9. Michael Golum, Private practitioner; Chairman Civil Liberties Committee

This committee does essentially the same thing as the American Civil Liberties Union, but works within the confines of the State Bar, trying to sway the bar to a more civil libertarian position. One activity of which Golum was particularly proud was overturning a judicial order to a hospital emergency room physician to take a blood sample pursuant to a search warrant, though he acknowledged that under *United States v. New York Tel Co*, 434 U.S. 159, 174; 98 S Ct 364; 54 L Ed 2d 376 (1977) the order might well have been valid, and the efforts of the committee may have frustrated the due administration of justice.

Golum opined that most of the members of his committee, if the bar became a voluntary organization, would join the bar and work to establish a civil liberties committee therein.

10. Robert D. Kaplow, Private practitioner Member, Grievance Committee

Kaplow's committee is concerned with the general operation of the grievance process. The committee proposed a Peer Review System to the Board of Commissioners, which the Board rejected, even though it would improve the competence of lawyers and was supported by the Grievance Commission and Attorney Discipline Board. Kaplow acknowledged that no part of the disciplinary machinery functions as a detective to ferret out incompetent or dishonest lawyers; instead, the system acts on complaints that are brought to it.

11. Michael V. Marston, Private practitioner
Chairman, Military Law Committee

The Military Law Committee drafted the Michigan Code of Military Justice and pushed it through the legislature, MCL 32.1001 *et seq*. Marston admitted that this code is essentially identical to the Uniform Code of Military Justice enacted by Congress in 1951, 10 USC §§ 801 *et seq*., and that there has been no court-martial under Michigan law since World War II, so that the necessity for changes in the law is purely theoretical.

12. Dennis C. Kolenda, Member
Special Committee on Revision of the Criminal Code

Over several years that task force drafted a completely revised criminal code, which the State Bar has for some time tried unsuccessfully to push through the legislature. Two years of attorney days were consumed in meetings alone. On cross examination, delving into particular applications of the proposed code, it was established that those portions representing changes in existing law may well be detrimental to the public interest.

13. R. Stuart Hoffius, Judge, Kent County Circuit Court
Chairman, Law & Media Committee

This committee exists to foster a liaison between the bar and the media, in part in hopes of improving the image of the bar published or broadcast in the various media. The committee has discussed the use of television and electronic devices in the courtroom, worked to develop guidelines for reportage of major trials, and addressed the problem of search and seizure of media facilities. Judge Hoffius identified the committee's current interests as regulation of the

bench and bar *vis a vis* the media while preserving intact the public's interest in a free press and fair trial. The committee gets cooperation from the Michigan Broadcasters' Association and Michigan Press Association, voluntary groups, and has induced the State Bar to sponsor media awards.

14. John Robert Dethmers, Private practitioner
Chairman, Committee on State Trial Courts Administration

Since 1959 this committee has worked to revamp the structure of the Michigan trial court system, and was instrumental in the creation of the Court of Appeals also. By the time the State Bar was prepared to address the issue of lower court reorganization, the Governor was in the process of appointing a commission to propose legislation on the subject, and several bills were already in the legislative hopper. The Supreme Court then collaborated and a joint legislative committee was established, in which the State Bar played an important role. Despite the existence of the Committee, the Supreme Court created its own Committee on Local Court Rules. While claiming that his personal motives these past 12 years were solely to improve the administration of justice, create new jobs and opportunities for lawyers, Dethmers joins other organizations and contributes his energies to them, on the basis of his interest in their work and their dedication to public service.

15. William G. Reamon, Private Practitioner; Past State Bar President
Co-Chairman, Judicial Qualifications Committee

This committee, formed at the instigation of the Governor, evaluates persons being considered for appointment to judicial office on the basis of professional, rather than polit-

ical, qualifications. Unfortunately, 90-95% of the public is unaware of the existence of the committee, and thus sources of information on candidates are severely limited. The fact that all committee members have been active in bar affairs over the years gives the impression to candidates that bar activity may be beneficial to their rating by the committee, and the committee may have a "mind set" that favors bar activists. Reamon acknowledged that a voluntary bar association could perform the same functions equally well, exemplified by the American Bar Association's similar committee for the federal courts.

16. Lynda Krupp, Staff Lawyer
Wayne County Neighborhood Legal Services
Chairperson, Consumer Law Committee

A charter of the committee is "protection of the interests of the public at large with respect to the consumer laws of the State of Michigan." In the past three years, the major accomplishment has been publication of the pamphlet "How to Get What You Paid For" (Exhibit 12). While voluntary organizations dedicated to the same goals exist in Michigan, none apparently has the funding or interest to have undertaken this task (N.B. Equivalent pamphlets are published by every voluntary bar association on which there is evidence in the record.). If the bar were voluntary, Krupp would join and agitate for the creation of a consumer affairs committee.

17. Joel M. Boyden, Private practitioner, Chairman
Lawyers and Judges Assistance Committee

Aware of the problem of lawyers and judges incapacitated by virtue of physical, emotional or addictive disabilities, and of the ineffective response to the problem by the existing

disciplinary machinery, the Committee was created to develop an alternative method for both removing such people from positions of responsibility and rehabilitating them where possible so they can be returned to the professional fold. Working with the Michigan Medical Society, a plan was formulated which became GCR 970. The committee's task was simplified by virtue of the fact that governmental and private organizations had already studied alcoholism in the professions, and other voluntary professional groups have adopted similar programs.

The committee has also devised a Young Lawyer Assistance program, oriented towards making available to young lawyers knowledgeable older practitioners to help them avoid mistakes as they branch out into new areas of the law and of legal practice. This program works exclusively through the local, voluntary bar associations.

Plaintiff disavowed any objection to the work of this committee.

18. Quinn Earl Benson, Private practitioner; Chairman Arbitration & Alternate Methods of Dispute Resolution Committee

In addition to inducing the Supreme Court to expand the mediation principle from Wayne County to the entire State, GCR 316, the Committee has worked on the idea of neighborhood dispute resolution centers, to handle such common neighborhood problems as barking dogs, loud stereos, etc. The witness was aware of only one working program anywhere, that sponsored by the Chicago Bar Association on the North Side of the Windy City; the October, 1981 Michigan Bar Journal reported that, in fact, 140 neighborhood dispute resolution centers existed nationwide.

19. Sandor Gelman, Private practitioner, Chairman
Advertising, Certification & Specialization Committee

This committee has proposed a self-designation specialization plan and advertising guidelines, both of which were rejected by the Supreme Court. The witness was unaware of the long history of specialization, and accompanying organization and experience, in the medical profession (Exhibit 20).

20. Arthur Tarnow, Private practitioner; Former head of SADO; Chairman
Committee on Standard Criminal Jury Instructions

Unlike the SJI, the SCJI have not been adopted by the Supreme Court; instead, they are addressed individually as issues arise. Tarnow acknowledges that the SCJI could have been composed by another group, although they were not in practice; in particular, judges were reluctant to undertake the job, since they must ultimately rule on the finished product and are averse to in effect rendering advisory opinions. Other States, including Illinois, which has a voluntary bar association, have likewise promulgated SCJI's.

21. Eugene Mossner, Private practitioner, Chairman
Lawyers Professional Liability Insurance Committee

In response to escalating malpractice insurance premiums, the committee was formed in 1977, charged with studying and formulating recommendations pertaining to the availability and quality of professional liability insurance for Michigan lawyers. At the time, there was some concern lawyers would "go bare" rather than pay the premiums being charged. Through discussion with the American Home Insurance Company, the committee achieved rate

reductions beginning in 1980. Mossner's own firm of 13 lawyers saved $6200 in that year. Mossner noted that malpractice insurance is mandatory in Oregon, and that, if commercial carriers had proved uncooperative, the State Bar could have formed its own insurance company. The witness acknowledged that the work of the committee is as much self interest as public interest.

22. Dennis Archer, Private practitioner, Chairman Committee on Delivery of Legal Services

This committee has been concerned with why people do or do not retain lawyers to resolve their problems, and with publicizing the existence of free legal aid. Based on an ABA study indicating that a large number of people have unmet legal needs, the committee hoped to satisfy those needs through prepaid legal services plans, and to generate more *pro bono* contributions to pick up the slack left by the Reagan budget cuts. Prepaid legal services work with the United Auto Workers generated $18.5 million in lawyers fees. Among other States with prepaid legal service plans in operation are New York, Illinois, Pennsylvania, and approximately 26 others, as well as New Orleans, those named being voluntary bar associations.

23. Jeanette Paskin, Private practitioner, Chairman Appellate Court Administration Committee

This committee was the brainchild of T. John Lesinski, former Chief Judge of the Michigan Court of Appeals. Its major projects have been revising the appellate court rules (N.B. a complete revision of GCR 800-849 was prepared by the staff of the Michigan Court of Appeals *sua sponte*, and was introduced into the record) and formulating recommendations concerning the representation of indigents on

appeal. The committee has also discussed the problems caused by unpublished opinions and delays.

24. Frances Ryan, President
Lawyers Wives of Michigan

Lawyers Wives has 1600 members, who devote their collective efforts to public relations on behalf of lawyers and the legal profession and to education in the schools. The group has sponsored two non-law related art exhibits in the State Law Library, published a brochure on careers in the law, conducted an essay contest in the high schools, and concentrates on Law Day activities mostly in the schools. Additionally, the group acts as a conduit for new legislation, which it forwards, without comment or analysis, to school administrators. As Law Day is a substitute for International Labor Day ("Red May Day"), it may have political overtones. Many of the projects of Lawyers Wives are supported by funds raised locally; Mrs. Ryan personally belongs to "hundreds" of organizations to which she voluntarily pays dues.

25. Robert Wilson, Private practitioner, Chairman
Committee on Arbitration of Disputes Among Attorneys

The purpose of this committee is to avoid "airing dirty linen in public"; it deals with disputes emanating from partnership dissolution and fee splitting. Originally the disputants paid only a portion of the costs, and the State Bar underwrote the rest from compulsory dues. Recently the committee has begun to charge the parties actual costs (except the meal allocation for committee members and building costs borne by the State Bar), which has not deterred anyone from availing himself of this service. (N.B.

Massachusetts offers an identical service within the context of a voluntary bar association).

YOUNG LAWYERS SECTION

26. Donald Gasiorek, Chairman
Moot Court Section

This section annually sponsors the State level of the national moot court competition, which is conducted under the auspices of the Bar of the City of New York and the American College of Trial Lawyers, both voluntary organizations.

27. James Colbert, Chairman
Basic Skills Committee

Under the joint sponsorship of ICLE, the BSC operates an educational program directed to young lawyers, which is the most highly attended of all ICLE programs. Registrants' fees cover all costs of the program (again, other than meal and building functions for committee members).

28. Michael Harrison, Judge, Ingham County Circuit Court
Past Chairman, YLS

During Judge Harrison's tenure as president, the YLS concentrated on three areas: (1) public interest; (2) bar interest; and (3) law student interest. He described some of the many activities undertaken, and opined that no other group could have accomplished so much. However, he equivocated when asked whether a YLS within the context of a voluntary bar association might have duplicated these results, and admitted that YLS's in other States are involved

in many of the same activities. He conceded that it would be fair to say that, if one educates lawyers to the beneficial aspects of bar membership, they will become active volunteers (N.B. The same sentiments were reiterated by James Bierbower, President of the District of Columbia Bar).

29. John Minock, Chairman, Child Advocacy Committee
Chairman, State Bar Juvenile Law Committee

Minock's State Bar committee has no programmatic functions; it reviews legislation dealing with juvenile law, and consults with the House of Representatives, Legislative Service Bureau, etc. Picking up a thread from Judge Lincoln's comments during the testimony of Martha Seaman of the LSB, Minock observed that practitioners in a particular field have certain kinds of expertise that cannot be readily acquired through ordinary research, particularly as LSB staffers lack the time to "immerse" themselves in anything so complex as revision of the Juvenile Code. Minock flatly stated he would not consider his committee a success until it achieves enactment of a revised juvenile code.

The YLS Child Advocacy Committee is basically an educational project oriented towards attorneys who represent children in abuse and neglect cases, funded by YLS funds matched by an ABA grant. Seventy-five percent of the seminar "faculty" were non-legal personnel — psychologists, etc.

Recognizing Judge Lincoln as the nation's number one expert on juvenile law, Minock, when informed that Judge Lincoln had personally drafted and lobbied through to passage the current code, offered no explanation how his committee could improve on that. He acknowledged that numerous other groups, both of lawyers and judges, con-

tribute information and analysis to the legislature on a wide assortment of topics; in particular, the ABA has generated 20 volumes of standards on juvenile justice.

If the State Bar were a voluntary organization, Minock would join and work to create an active juvenile law committee.

30. Mary Kay Scullion, Chairperson
Paralegal Project SPSM (non-lawyer)

The project, so named in 1978 when begun, became the Prison Reform and Rehabilitation Committee and now has been separately constituted as the Prison Legal Services of Michigan, Inc. This corporation provides free legal counsel to Michigan prisoners in civil matters: social security, divorce, child custody and *habeas corpus*. Funding is provided by the YLS, Michigan legislature, MTLA, LEAA and ABA. The project lawyers plan to institute litigation to force the legislature to continue funding at present levels.

31. Fred Baker, Jr., Chairman
Provision of Legal Services to the Elderly

The YLS provided seed money for a legal clinic for the elderly in Ingham County, where, according to rumor, a previous attempt had failed. Some funding has come from Thomas M. Cooley Law School, as well as through the Older Americans Act of 1965 (PL 92-258), as amended (42 USC §§ 3001 *et seq.* and portions of titles 20 and 29). Although contending the project would have been impossible without the backing of the State Bar, Baker eventually conceded a voluntary bar could have accomplished the same thing (N.B. ABA reports over 40 such programs sponsored by local and State bar associations).

32. Michael Legg, Chairman
Law Firm Visitation Day

Legg's committee arranges for law students to visit Detroit metropolitan law offices to gain some insight into the realities of private practice.

33. John McSorley, Chairman
YLS

Describing the YLS as "the conscience of the State Bar" (a title claimed also by the Civil Liberties Committee), McSorley testified that the YLS seeks to identify needs not served by the State Bar itself and then to fulfill them. Under McSorley's tutelage and that of his predecessors, the YLS has won several awards from the ABA (N.B. Both the Massachusetts and D.C. YLS's, among others, have won such awards). McSorley spoke of several YLS programs, including a series of video tapes (Exhibit 18) "Law in Your Life", SCOPE (Senior Counselor Offering Professional Experience) (N.B. Reference Joel Boyden's Young Lawyers Assistance Program), and the section newsletter "Inter Alia". McSorley admitted that YLS's exist in most other states, including those with voluntary bar associations, as well as in some major metropolitan bar associations.

34. Lawrence Nolan, Chairman
Prepaid Legal Services Committee
Travel and Tours Committee
United States Supreme Court Admissions Trip

As wearer of three hats, Nolan testified that the Supreme Court trip costs the section about $500 per year, and is strictly a service to interested members in the bar.

The Travel and Tours Committee actually returns a profit

to the section, and hence plaintiff, so long as this continues, disclaims any objection to its work.

Prepaid Legal Services represents a significant profit making opportunity for lawyers in private practice, which is what motivated Nolan to take an interest, as he feared he might lose a portion of his blue collar clientele to the UAW prepaid legal plan.

Nolan noted that at least one voluntary bar association, the New York BA, also has a Supreme Court trip, as do other associations.

35. Larry Powe, Chairman
Publications Committee

Powe introduced Exhibits 25-31, publications of the YLS on various topics (N.B. These, and other pamphlets, were duplicated in kind and quality by those published and disseminated by other bar associations, both State and local, as shown by other exhibits).

Powe was also Chairman of the Alternatives within the Law Committee, which was geared toward law students. That committee's functions have not been preempted by the law schools themselves.

Previously, Powe chaired the now defunct Credit Union Committee, which after investigating the subject concluded it lacked sufficient attractions.

36. Henry Clay III, Chairman
Annual Meeting Committee

Clay introduced Exhibit 32, a summary of YLS annual

meeting activities, which ordinarily consists of a single seminar, e.g., in 1980 the topic was "Automatic Data Processing and the Law", in 1981, "Grievances and How to Avoid Them".

37. Daniel Stepek, Past Chairman
YLS

Stepek described the YLS Labor Arbitration Qualification Program, which trained lawyers to become labor arbitrators.

38. Marc Shaye, Past Chairman
YLS

Shaye introduced Exhibit 33, two applications for ABA awards and letters of critique on YLS projects.

YLS related evidence concluded with introduction of Exhibit 37, an affidavit describing the many awards won by the Michigan YLS, which noted the existence of some 220 other YLS's.

End Young Lawyers Section

39. Francis J. Coomes, President
Public Affairs Associates (non-lawyer)

Mr. Coomes, based on impressive credentials establishing his expertise in the legislative process, is the President and founder of the organization which is the paid lobbyist for the State Bar — $43,000 annually. Coomes on direct examination opined that the State Bar is unique in its dedication to the public interest, although on cross examination he admitted he really did not understand the substance of any of the legislation on which he had lobbied, and acknowledged that his other clients, who include professional associations (e.g. CPAs), similarly couch their legislative proposals in terms of the public interest. Coomes denied any knowledge as to how the administration of justice is affected by the various bills on which the bar takes an active interest.

Coomes described some of the major "accomplishments" of the State Bar lobbying effort, including the court reorganization package (as to which the Supreme Court provided the main impetus, the State Bar merely assisting) (Coomes denied the qualifications to comment on the effect of this legislation, which promoted such people as Traffic Referree William Hague in rank and status), the medical malpractice package (shown by later exhibits, particularly #94, to have had little practical effect), defeat of a bill which would have put the Attorney Grievance Commission in the Department of Licensing and Regulation (and thus have accomplished some of the reforms recommended by Mr. Ballenger), and defeat of a bill which would have made improvements in the judicial selection process (not because the bill was in any way bad, but because, by improving the process, it would make more difficult the bar's long term effort to eliminate the election of judges — a "whole loaf or none at all" approach).

40. Leo Farhat, Past President
State Bar of Michigan
Chairman, Committee on Scope and Correlation

This committee establishes the legislative program goals for the State Bar, and has established the criteria which guide the bar in its lobbying program. Although contending that the compulsory bar, by virtue of its all inclusive nature, is less motivated by self interest than voluntary bars, Farhat admitted that the ABA is no more characterized by self interest than the State Bar.

41. Peter Alter, Private practitioner, Chairman
Constitutional Law Committee

The committee's main focus has been the aftermath of Proposal K, the bail reform initiative. The committee recommended amendments to GCR 790 in consequence.

42. Julius Hanslovsky, Private practitioner, Chairman
Insurance Law Committee

A member of numerous voluntary lawyer associations, and active as such, Hanslovsky described his committee as consisting of practitioners dealing with insurance law and interested in developments therein.

43. Carl Smith, Jr., Private practitioner, Past President
State Bar Local Bar Liaison Administrator for the State Bar

Although he has since resigned his position, Smith worked with local bar groups to help them appreciate State Bar programs and to encourage them to participate and to develop programs of their own. He developed several media

spots containing both informational and "hire a lawyer" messages.

44. Leonard Esquina, Legislative Ombudsman, Chairman
Prisons and Corrections Committee

His committee's concern is with the rights of prisoners in the Michigan correctional system; their successes have been twice inducing the Supreme Court to declare unconstitutional legislation proscribing the possession of weapons by prisoners.

45. Donald Reisig, Private practitioner
Treasurer, State Bar
Chairman, Fiscal Committee
Chairman, Legislative Committee

Reisig discussed the budget process and how the Board of Commissioners approaches issues of legislation.

46. William Ralls, Private practitioner, Chairman
Oil and Gas Committee

This committee is dedicated to preservation of Michigan's natural resources and reasonable regulation thereof. All members of the committee are private practitioners whose clients favor production; cross-sectionally, they represent landowners, wildcatters, drillers, producers, pipelines, etc., but none represent environmental interests.

47. William Weiner, Professor of Law, Member
Criminal Jurisprudence Committee

This committee tracks developments in the criminal law.

48. Michael Perry, Private practitioner
Member, Medical-Legal Committee

The committee is devoted mainly to jawboning as a way of resolving continuing friction between the medical and legal professions. Perry acknowledged that the physician members of the committee represent voluntary organizations.

49. Otto Stockmeyer, Jr., Professor of Law
Member, Judicial Selection Committee

This committee is devoted to amending the Michigan constitution to eliminate the election of appellate judges and institute "merit selection" by the Governor — from a list of candidates to be compiled and submitted to the Executive by the bar.

50. John Krsul, President Elect, State Bar
Chairman, Committee on Committees

A major interest of the committee is institutional advertising — advertising to enhance the image of the profession, in part a reaction to private lawyer advertising considered by the committee to be unseemly. Other State bar associations pioneered in this field; two surveys revealed that more than 50% of the lawyers in Michigan oppose institutional advertising, and the Board of Commissioners eventually acceded to this majority sentiment.

The committee has studied empirically the volume of *pro bono* work done in Michigan with an eye to recommending whether it should remain voluntary or become mandatory. Also, the committee sponsors seminars aimed at advising the public of its legal rights, and prepared a kit to assist local

bar groups to set up their own seminars.

The Committee has been active in making Law Day "no bills day", establishing "Ask the Lawyer" programs, and publishing related brochures.

One pamphlet is designed to help new lawyers create a financially viable practice. The committee also does a great deal of public relations work on behalf of the profession, sponsoring media awards, issuing press releases on actions by the Representative Assembly, sending letters to newspapers when articles critical of attorneys appear, and mailing news items to 3500 "opinion leaders".

51. Charles Rutherford, Private practitioner
Chairman, Client Security Fund

Established in 1967, the CSF is allocated 5% of annual dues. As of May 15, 1981, the CSF had paid 145 claims totalling $600,000, and had a balance of $300,000. No claims are paid unless there has been an adjudication of professional misconduct by the grievance authorities (except *post mortem*). Lawyers suspended for more than 120 days must reimburse the CSF as a prerequisite to restoration of their license to practice law, GCR 972.2(9).

Exhibit 44 is the "Rules of Procedure of the Client Security Fund". Reimbursements are limited to $15,000. Victims of peculations by house counsel are excluded from the protection offered by the fund. Money or property lost as a result of tortious conversion by an attorney cannot be restored unless it is proved there was an intent to defraud at the time the money or property was first received. No losses arising outside the scope of a specific attorney-client or fiduciary relationship are covered. Losses caused by the acts

of an attorney who has been disbarred or suspended which occur during the period of disbarment or suspension are similarly not covered. Reimbursement from the CSF is a gift of grace, not a legally enforceable right. (N.B. It appears that every State bar association has a client security fund).

52. Carl H. Von Ende, Private practitioner
Chairman, Annual Meeting Coordinating Committee

Von Ende testified that 90% of annual meeting programs are educational.

53. William Couper, Private practitioner
Chairman, Committee on Libraries, Legal Research and Publications

The purpose of this committee is to foster and promote the development of facilities and materials for research and their dissemination throughout the State and to promote economically efficient access thereto while maintaining the broadest scope of the materials possible. The committee advises the state law librarian on the needs of the bar. It has studied county law libraries and drafted standards for them, and it acts as a clearinghouse for disputes between lawyers and publishers.

54. Irwin Aterman, Private practitioner
Chairman, Plain English Special Committee

This committee was formed at the request of the legislature. While many organizations outside the bar can deal with substantive or procedural improvements or academic, scholarly, or practical concerns on various legal subjects, e.g. American Law Institute, the Law Revision Commis-

sion, the Commissioners on Uniform State Laws, this committee claims to be unique in having no axe to grind. As a result, it contends that litigation over the subject of plain English will be avoided. If the bill now in the legislature is passed, the Committee will save those affected money by providing, *gratis*, suggested forms. Although the legislature rejected the committee's draft of a proposed bill, the committee is nonetheless satisfied with its work. Alterman stated that, although the cross section of opinion on the Committee could have been duplicated by the legislature acting alone, the donation of time could not.

55. R. Gerald Barr, Judge, St. Clair County
Probate Court
Chairman, Judicial Section

This section has studied court management, small claims, and child care budgets. Barr acknowledged that voluntary judges organizations exist at every level and actively lobby. The Supreme Court has an educational budget for judges, and sponsors the Michigan Judicial Institute, but the section needed State Bar funds to make up reductions in Supreme Court appropriations.

56. Sheldon Larky, Private practitioner
Chairman, Character and Fitness Committee

This is the only committee listed in the Rules Concerning the State Bar, Rule 15. This committee reports its finds to the Board of Law Examiners, and acts as prosecutor when, in the face of an adverse recommendation, the applicant demands a hearing before the Board. By statute, the committee is the investigative arm of the Board, and has subpoena powers. (Plaintiff disclaims any objection to the work of this committee.)

57. William F. Ager, Jr., Judge, Washtenaw County Circuit Court
Chairman, Ethics Committee

The charter of this committee calls for it to conform the system of justice to standards of conduct above reproach, and to give written opinions as to the propriety of professional and judicial conduct of members of the bar. A differentiation exists between informal and formal opinions; the former are approved by the committee, the latter by the Board of Commissioners. The committee cannot give opinions on actions of judges, believing only the Judicial Tenure Commission has power to do so.

58. Eugene Moore, Jr., Judge, Oakland County Probate Court;
Chairman, Crime Prevention Center Committee
Chairman, Youth Legal Education Committee

The CPCC is charged with developing community programs to prevent crime. It maintains an annual program of 3-4 workshops in conjunction with Children's Charter, geared specifically towards preventing juvenile crime and rehabilitation of juvenile offenders.

Children's Charter is a Michigan non-profit membership corporation, whose members are primarily probate court juvenile judges and social scientists. It exists to develop educational programs for judges, caseworkers, juvenile court staff and lawyers. It is financed by individual contributions, foundation grants and $1000 from the State Bar, for which the bar reaps huge returns in public goodwill.

The Youth Legal Education Committee was created to mesh with efforts of Lawyers Wives of Michigan in high

school and junior high school educational programs. Its main importance is in terms of public relations.

59. D. Michael Kratchman, Private practitioner
Chairman, Lawyer Utilization Special Committee

This committee's purpose is to investigate whether many new lawyers are unemployed. A study revealed no present problem but suggested the situation bears watching. Kratchman defined the public interest served by the committee's work as advising students of their prospects of employment after graduation from law school.

60. Alan Kellman, Executive Director
Legal Aid & Defender Association of Detroit
Chairman, Legal Aid Committee

The Legal Aid & Defender Association is a non-profit organization formed by the Detroit Bar Association in 1908, which expanded its services to criminal defense work after the 1967 riots with the help of the Detroit BA, New Detroit, Inc., and the Kresge Foundation. Since 1970, however, its leadership in providing legal aid to the indigent has been preempted by the State Bar.

The jurisdiction of Kellman's committee is to represent the interests of persons who are unable to afford counsel. The committee has worked to effectuate changes in the civil commitment process, opposed federal certification of lawyers, dealt with proposed changes in small claims court jurisdiction limits and exemptions from execution, and was instrumental in adoption of the study practice rule, GCR 921. This prompted Judge Lincoln to note that the State Bar, through this committee and others, is interfering with the process of law and skewing the political balance of a free

society.

61. Robert Roether, Private practitioner
Chairman, Civil Procedure Committee

The committee responds to and initiates changes (improvements) in civil procedure, including jury instructions, and lobbies the Michigan Supreme Court for rules changes.

62. Austin Hirschhorn, Private practitioner
Chairman, Economics of Law Committee

The committee's purpose is improvement of the economic position of the lawyer, in pursuit of which it disseminates information to assist lawyers to understand the economics of practice. The committee has promoted the use of new technology and use of non-lawyer personnel in the practice of law. The advantage to the public asserted is providing information on charges for various legal services, types of services available and on available technology.

63. H. Rollin Allen, Private practitioner
Chairman, Unauthorized Practice of Law Committee

Pursuant to State Bar Rule 16, the committee investigates and prosecutes cases involving the unauthorized practice of law, supplanting a similar committee that existed under the auspices of the Detroit Bar Association. The committee protects the public from injury at the hands of untrained people who intrude into the legal arena.

64. Nedwin L. Smokler, Private practitioner
Secretary, Latin American Bar Section, Member, Special Committee for Expansion of Under-represented Groups in the Law

Revised Standard 212 of the ABA requires law schools to

commit themselves to expanding opportunities for minorities in the law, in response to the *Bakke* decision. The committee was formed in response to the inordinately high failure rate of minority law students. (N.B. *Bakke* does not require affirmative action, but merely permits it).

65. Bert Burgoyne, Private practitioner
Chairman, Condemnation Procedure Committee

The three main activities of this committee have been revising controlling legislation in the area of condemnation (eminent domain, not health and safety), the formulation of standard jury instructions for such cases, and, 18 years ago, counseling ConCon to abolish old *sui generis* methods of condemnation. PA 1980, No. 87 is the result of 20 years of the committee's work, and the basis of the Poletown Project. Burgoyne acknowledged that the same thing could have been accomplished under any official aegis other than that of the State Bar, and in fact the Law Revision Commission contributed to the effort. Harkening back to the testimony of John Braden, Burgoyne noted that Act 87 gives property owners actual attorney fees in some situations, thus abolishing the "American Rule" in order "to achieve justice".

66. Wallace M. Handler, Private practitioner
Chairman, Expansion of Legal Practice Committee

The task of the committee is to find new areas of employment for lawyers. It has attempted to form a bar-sponsored title insurance company (after the Ohio model, a voluntary bar association), but abandoned the effort as not in the interest of the bench, bar and the public. The committee worked on the expansion of GCR 316 to counties other than Wayne, and on the idea of volunteer judges similar to FRCP

53 (N.B. Masters in chancery are prohibited by Const 1963, Art 6, § 5, carrying forward Const 1908 Art VIII, § 5; see *Frank v Schultz*, 295 Mich. 714 (1941). See *Brockman v Brockman*, 113 Mich. App. 233 (1982).

67. Patrick Durrin, Private practitioner
Chairman, U.S. Courts Committee

The committee's jurisdiction is the administration, organization, and operation of federal courts for the purpose of securing the effective administration of justice. Three members of the committee are appointed by the Chief Judges of the Michigan federal courts. Projects include lobbying for bar input on local rules changes in the Eastern District (unsuccessfully), advising the court on the competency of the bar (the "Detroit Report"), adopting a local peer review system, and obtaining space in the court buildings for lawyers to meet and counsel with their clients. The committee has not met for one year. Much of the committee's success has been attributable to the fact that the Chief Judge of the Eastern District is a former State Bar Commissioner and past president of the Detroit Bar Association.

68. Patrick Keating, President, State Bar

Keating discussed legislative activity of the bar outside the committee structure, focussing on the sections. The Real Property Section worked extensively on revising the mechanics' lien law, at the request of the legislature, resulting in a bill 85% drafted by the State Bar, the remainder "screwed up" by special interests. Keating testified that the Legislative Service Bureau, due to staff turnover, is inadequate to such a task.

69. Michael Karwoski, Assistant to the Executive Director, State Bar

Karwoski devoted himself to the task of compiling useful numbers to reflect the activities of the State Bar. Including travel time, he estimated that for the year 1979-1980, 485 members of the State Bar attended 197 meetings aggregating 15, 182 lawyer hours. Using an average hourly charge of $70 for a lawyer's time, Karwoski rated the value of this *pro bono* component at more than $1,000,000, exclusive of the contribution of the Young Lawyers Section.

Karwoski similarly estimated commissioner and Representative Assembly time, producing figures of eight meetings, averaging 20 to 25 commissioners in attendance, six hours per meeting, totalling 1000 hours plus three hours travel for an additional 480 hours. The figures for the Representative Assembly were 108-131 members, three meetings, six hours per meeting plus travel, total 3000 hours.

70. Michael Franck, Executive Director
State Bar

Mr. Franck devoted most of his testimony to clarifying a series of small points. He noted, for example, that the Lawyer Placement Service generates income which exceeds out-of-pocket expenses, but falls short of matching overhead by some $6000 per year (Exhibit 47).

Mr. Franck, in describing the State Bar's relations with the ABA, noted that $5000 in State Bar funds were spent in support of former State Bar President Wallace D. Riley's campaign for election to the office of ABA President (subsequent to the hearings, the ABA Nominating Committee agreed to send Mr. Riley's name to the House of Delegates,

this being tantamount to election).

71. Thomas J. Wynn, President
Massachusetts Bar Association

Of 18,000 lawyers in the Commonwealth, 11-12,000 are members of the MBA. Dues range from $100 for those admitted to practice more than ten years to $75 in the 5-10 year category, $25 in the 1-4 year bracket. Massachusetts has a partially unified bar; its Board of Overseers, the Supreme Judicial Court's disciplinary arm, charges mandatory dues of $75, a portion of which is allocated to the Client Security Fund.

The MBA employs 18 people, leases office space in downtown Boston (while in the process of buying a building of its own), and has an annual budget of $1,000,000. Education is provided through MCLE, but the bar hopes to reacquire CLE as a constituent organization inasmuch as it generates a substantial profit annually. Mr. Wynn noted that CLE programs are one of the few sources of profit for voluntary bar associations. Most CLE programs are aimed at lawyers, but the MBA also does "Ask the Lawyer" programs on radio and TV. The Massachusetts Bar Foundation sponsors a judicial institute, while the MBA runs a Law Day program in the high schools. There is no Lawyers Wives organization, as spouses are integrated into the mainstream of bar activities; also, two active Women's Bar Associations make such a subsidiary impolitic. The Women's Bar Associations provide free counsel on abortion, for unwed mothers, and other issue oriented public services. The MBA YLS matches the Michigan counterpart in quality and scope of activities, although Mr. Wynn felt that generally the YLS siphons quality leadership away from the central organization and expends its energies before the MBA can take

advantage of the acquired talent and experience.

The MBA has a full time paid lobbyist ("legislative counsel"), and has been an effective lobbying force. The democratic process governs the taking of positions, although minorities are free to pursue their contrary views. Most bills proposed by the association are the result of compromise and consensus, as each committee represents a cross section of the MBA. Some 2000 bills a year are screened, roughly equivalent to the Michigan experience.

Although committees and sections operate in their self interests, to be successful they must temper this with concern for the administration of justice and the public welfare. Practical politics precludes lopsided bills. The MBA lobbies all three branches of government, and like the State Bar responds to requests for assistance from all three as well. A Political Action Committee may be formed in the near future.

Each of the MBA's 11 sections publishes a newsletter, in addition to which the MBA has its own newsletter and the Massachusetts Review, a scholarly journal equivalent to a typical law journal. The MBA publishes a series of pamphlets for the public, covering such topics as small claims court, lawyers, fees and services, etc. The Lawyer Referral Service earns a tidy profit for the association, while generating, as a requirement of participation, substantial components of *pro bono* and reduced fee legal work.

The Association maintains a fee arbitration board, which deals not merely with disputes among lawyers *inter sese* but with lawyer-client problems as well. The MBA sponsors several awards, such as Legislator of the Year, and has

pressured insurance companies to reduce malpractice premiums. It hopes to be able soon to offer group professional liability insurance at such reduced premiums as will offset annual dues.

Explaining membership activity, Mr. Wynn acknowledged that perhaps 33-40% of lawyers do not belong to the MBA, but he estimated that 80% of active lawyers are members. He values the right of disgruntled members to quit the association, and notes that no one has done so, even over the issue of no-fault insurance.

72. Roger Lande, President
Iowa Bar Association

98% of the lawyers in Iowa are members of the IBA. All lawyers pay a mandatory one-time fee to the Iowa Supreme Court for licensure, and are subject to assessments for the Client Security Fund, although the low rate of claims has meant no assessment for several years. Discipline emanates from a Lawyer Grievance Commission and Ethics Committee whose members are appointed by the Supreme Court. The association's annual budget is approximately $700,000; dues are $100 for those admitted over 5 years, $75 for 1-5 years, $25 for retired or inactive lawyers, and free the first year of practice. The budget receives support in the form of $100,000 profit from CLE programs and rebates from its group life insurance program.

The IBA has some 50 committees, paralleling in scope and coverage the activity of the State Bar's many committees. Spouses are integrated into the organization's activities, so there is no wives' organization. The IBA sponsors educational programs for the bench, the bar and the public. It has a full time lobbyist and a part-time attorney-lobbyist.

If a sizeable minority dissents, the association refrains from taking a position on legislative matters, e.g., no-fault insurance. It takes positions only in the public interest, and also provides "technical assistance" at the request of committees and individuals in the legislature.

Pro Bono services are provided through the Lawyer Referral Committee and the Committee on Legal Services for the Indigent.

Lobbying is "very, very effective"; the IBA has never been defeated on an issue of importance.

The IBA YLS has won at least one ABA merit award in the past six years; the association itself gives merit awards of various kinds unsystematically. Activities run the gamut: Law Day programs, a full line of brochures and pamphlets, etc.

Some 1000 lawyers of the 6000 in the State of Iowa become actively involved annually, expending thousands of attorney hours on association business.

Lawyers not in private practice, it is to be noted, do not contribute the the Client Security Fund. In contrast to the Massachusetts BA, the IBA has never sought unification.

Institutional advertising has been conceptually rejected by the IBA which prefers to emphasize its good works rather than declaim its virtues. There are 99 county bar associations in Iowa, some so active they ran their own legal aid programs prior to the advent of the Legal Services Corporation. Still others operate their own CLE programs — a rural county BA ran a CLE program in San Francisco. Possibly the high level of bar activity is attributable to

demographic factors — the number of lawyers in each county is small enough that peer pressure forces all to maintain a minimum level of activity.

73. Dennis Ramey, Assistant Executive Director
Ohio Bar Association (non-lawyer)

The OBA has 17,000 members out of a lawyer population of 26,000. Dues are $155 for those admitted to practice more than six years ($110 out of state), $90 for three-six years, and $25 zero-two years, with a voluntary "sustaining member" category of $200. Its annual budget is $2,000,000.

Administratively, the OBA consists of 32 committees, eight sections, and the YLS, each of which has its own bylaws, board of governors, and dues. The Ohio Supreme Court has a registration rule, but the annual fee has been cancelled each of the past four years. Discipline is carried out outside the OBA, but the association spends $100,000 per year on its Office of Disciplinary Counsel. The Association donated its building, taking perpetual lease, to Ohio State University, and maintains also an Office of Governmental Affairs near the State House, where two full time lobbyists further the OBA's interests.

The OBA takes positions on 15-20 bills per month, and offers about 20 pieces of legislation drafted by its committees and sections annually.

The Ohio Legal Center Institute is the OBA's CLE arm, and is self-sustaining. In addition, law-related education for school children is provided through various programs, for which the association received an ABA Award of Merit.

One-third of the association budget goes to the produc-

tion and mailing of its weekly magazine, which contains the Ohio Supreme Court advance sheets. The remainder is expended for salaries, travel, ABA activities, etc.

The Ohio Bar Foundation, funded by sales of publications, contributions, group insurance rebates and profits from the Ohio Bar Title Insurance Company, has a full time research director and does typical foundation research.

Ramey, a Certified Association Executive, believes the OBA's lobbying activities further the administration of justice, in about the same manner as lobbying by the Ohio CPA organization, of which he was executive director.

The OBA publishes the usual brochures, sponsors typical awards, and its 96 local constituents exhibit varying levels of activity. Senior citizens are entitled to a 25% discount when using the Lawyer Referral Service. In addition to initiating legislation, the OBA responds to requests from the legislature and Governor for analytical assistance.

74. Spencer L. Kimball, Professor of Law
Executive Director
American Bar Foundation

The ABF is the research arm of the ABA, studying law and legal institutions. Its main emphasis is on the functioning of institutions rather than on substantive law.

Over the past two centuries, the bar has achieved a unity with the bench in terms of dedication to justice that matches that prevailing in England from the 17th to 19th centuries. By virtue of tradition, rather than any moral imperative, the bench regulates the bar, and has a correlative duty to insure that the profession operates in a fair and just manner.

Professor Kimball considers Justice Frankfurter's practice of acting as advisor to President Roosevelt during his tenure on the bench a violation of the spirit of the Anglo-American system of justice (N.B. Cf. *Matter of Hague*, 412 Mich ____(slip opinion, pp. 17 ff.). He views restrictions on retired judges seeking political office (only one year or more after leaving the bench; see Canon 7A.(3) of the Code of Judicial Conduct) as deleterious to the public interest, commenting: "The protection should be built into the ethical value system of the profession rather than artificial rules that make it impractical for them to live in the real world."

According to Kimball, the role of the profession in the administration of justice, beyond representing clients, is large but limited, and subject to debate. An empirical study of the Chicago BA shows that a broadly based, representative association provides an excellent forum for debate of issues which is disabled from expressing strong positions. There is no extant study demographically comparing unified and voluntary bars in this respect, but the ABF anticipates completing such a study by December, 1982.

In order to oversee the admissions process and discipline, some form of bar organization is mandatory; these are, unfortunately, matters on which the bar nationwide has done a poor job. Discipline needs to be "more broadly administered by somebody who will eliminate the incompetent and corrupt from the profession." (N.B. This accords with the testimony of Mr. Ballenger).

Contrary to suggestions made by the State Bar, lawyers are over represented, not under represented, at every level of the legislative, executive and judicial branches of government in comparison with their portion of the population.

Voluntary and unified bars, from Mr. Kimball's expert overview, serve the public approximately equally. The legal profession has a unique perspective to offer on many, but by no means all, issues, and the courts should actively monitor the bar's lobbying activities and limit the bar to matters within its special expertise, keeping it out of political questions (using "political" in the broad sense, not restricted to "partisan political"). Some kinds of education, other than CLE, might well not be the proper function of the bar. Referring to the State Bar's funding of Mr. Riley's campaign for the ABA presidency, Mr. Kimball flatly stated it is improper to use compulsory dues to support any kind of candidate for any office, other perhaps than judicial office.

75. James J. Bierbower, President
District of Columbia Bar

The DC bar is a forced association, with 36-38,000 members. Dues are $45 per year for active members, $20 for inactive. Approximately 75,000 members are inactive.

For 100 years, the District had a voluntary bar, then in the 60's the need for a unified bar became apparent — recreant lawyers were not subject to discipline if they were members of the bar of another jurisdiction.

The mandatory bar's Lawyer Referral Service is self-funded, and includes a matching *pro bono* requirement. Lawyers participate in the service to generate business for themselves.

The Client Security Fund of the mandatory bar has no upper limit officially. The bar considered forming its own malpractice insurance company, but rejected the idea because several large private firms have an insular arrange-

ment that makes the notion impracticable.

By referendum, use of mandatory dues to support CLE, LRS and information service programs was terminated. However, a letter requesting voluntary support generated $250,000. CLE actually makes a profit, so much so that other groups are trying to get a piece of the action.

There are many other lawyer organizations in the District, several of whom work on Law Day activities. Lawyers Wives of Washington sponsors a public school essay contest, and generally Law Day is well taken care of.

The fight over funding Legal Services Corporation was described by Mr. Bierbower as "front page news", a major political controversy (N.B. See testimony of John Braden). The lawyers in the District support a very active, strong legal aid program, all with voluntary contributions.

Before a referendum eliminated mandatory bar lobbying activities, it found itself in occasional conflict before the legislature with the voluntary bar. After the mandatory bar found its ability to use compulsory dues restricted, voluntary contributions permitted all programming to continue, with no reduction in scope or level of activities. Mr. Bierbower, who was previously President of the voluntary bar, feels he can get all the money needed simply by asking members for it. He is pleased with the new order, since it eliminates internal strife in the organization without reducing the ability of the bar to serve the public interest.